SUPREME COURT OF THE UNITED STATES.

No. 354.

SUSAN P. HEPBURN AND HENRY H. P. HEPBURN, PLAINTIFFS IN ERROR,

vs.

HENRY A. GRISWOLD.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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a COMMONWEALTH OF KENTUCKY, *Louisville chancery court, sct.:*

Pleas before the Hon. Henry Pirtle, chancellor and sole judge of the c. court aforesaid, held at the court-house, in Louisville, on the 15th of April, 1864.

Petition in equity.

HENRY A. GRISWOLD, pl'ff,
vs.
WILLIAM PRESTON, SUSAN PRESTON HEPBURN, H. P. Hepburn, John Preston, defendants.

Be it remembered that heretofore, to wit, on the 26 of December, 1861, came the plaintiff by counsel, and filed in the clerk's office of the court aforesaid his petition, to wit; which petition is as follows, to wit:

Plaintiff says that he holds the note of the defendants, dated June 20, 1860, due and payable on the 25 day of February, 1862, for eleven thousand two hundred and fifty dollars. Said note is filed herewith.

STATE OF KENTUCKY:

Pleas before William Sampson, chief justice, and B. J. Peters, R. K. Williams, and George Robertson, associate judge, composing the court of appeals for the State of Kentucky, at the capitol, in Frankfort, 17th day of June, 1865, and in the year of the commonwealth, upon an appeal (or writ of error) to a decree of the Louisville chancery court.

HENRY A. GRISWOLD, appellant.
against
H. P. HEPBURN AND SUSAN P. HEPBURN, his wife, appellees.

Be it remembered that on the third day of May, 1864, the following transcript of a record from the Louisville chancery court was filed, to wit:

Plaintiff says that defendant William Preston has voluntarily left the county of his residence; has been absent therefrom for thirty days, and during said period of time has been, and continued voluntarily within the so-called Confederate States or their military lines.

Since the execution of said note Susan P. Christy has intermarried with her co-defendant, Hepburn.

Plaintiff asks attachment ag'st said William Preston's estate, and all proper relief.

S. B. SMITH.

Henry A. Griswold says the allegations in the above petition are true as he verily believes.

HENRY A. GRISWOLD.

Subscribed and sworn to this 26 of December, 1861.

SAM. B. SMITH, *N. P., Jeff Co.*

Bond executed in sum of $22,500 00; atta. granted for $11,280 00. 26 Dec'r, 1861.

WILL. R. HERVEY, *Cl'k.*

The following attachment bond was executed by the plaintiff, to wit:

Bond in Lou. ch'y court.

HENRY A. GRISWOLD, pl'ff,
vs.
WM. PRESTON, &c., def't.

We undertake that the plaintiff, Henry A. Griswold, shall pay to the defendant Wm. Preston the damages not exceeding twenty-two thousand and five hundred dollars, and which he may sustain, by reason of the attachment in this action, if the order therefor is wrongfully obtained. 26 December, 1861.

JOHN MORTON.

Attest: WILL. R. HERVEY, *Cl'k.*

Whereupon the following summons and attachment thereon indorsed issued, to wit:

Summons.

The commonwealth of Kentucky to the marshal of the Louisville chancery court, greeting:

We command you to summon Wm. Preston, Susan Preston Hepburn, H. P. Hepburn, and John Preston to answer a petition exhibited against them in our Louisville chancery court by Henry A. Griswold, and warn them that upon failure so to do, for twenty days after service hereof if in Jefferson county, or for thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled, or proof taken at petitioner's option. And make due return hereof within 20 days from the date hereof.

Witness Will. R. Hervey, clerk of our said court, at the court-
4 house, in Louisville, the 26 day of December, 1861, and in the 70 year of the Commonwealth.

WILL. R. HERVEY.

Attachment.

The marshal is directed to attach and safely keep the property of the defendant Wm. Preston not exempt from execution sufficient to satisfy the plaintiff's claim of $11,280 00 for debt and probable costs; also to summon the garnishees to answer in the action on the return day hereof, and make due return thereof.

Att: WILL. R. HERVEY, *Cl'k.*

26 of December, 1861.

And the same was returned by the proper officer, viz:

Marshal's return.

Came to hand 26 December, 1861, at 4.35 o'clock p. m.; levied same day on the property described accurately in the annexed return, and executed on John Preston 31 December, 1861, by delivering him a copy of within. Others not found.

W. C. D. WHIPS, *M. L. C. C.*

Came to hand 26 Dec'r, 1861, at 4.35 o'clock p. m.; levied same day on the following described property, namely: Lot known
5 as No. 8 on plot of Howard and Page's partitions, containing 27⅞ acres, which partition is recorded in book K K, page 4; lot containing 15 acres, known as No. 3 in the division between Preston's heirs made about 1849, situated near the corner of Broadway and the Newburg road, excepting therefrom the lot heretofore sold to Peter Noll, fronting 395 feet by 200 feet deep; lots Nos. 2, 3, 4, 8, 9, 12, 13, 17, and 18, lying in Louisville between Fulton street and the river, and lots Nos. 11 and 12 between Washington street and the creek, on plot in case of Johnston *vs.* B'sse. No. 338 in this court; lot No. 3 in same subdivision lying between Garden street and the creek; lot of 94 feet of ground fronting on the north side of Walnut street between East and Floyd streets, and extending back same width 204 feet, conveyed to W. Preston by Gus. Holt.

W. C. D. WHIPS, *M. L. C. C.*

6 *Order app'ce of Wm. Preston and Barr.*

At a court held as aforesaid, on the 3d of January, 1862, came plaintiff by counsel, and on his motion, it appearing to the court that the defendant Wm. Preston has voluntarily left the county of his residence, has been absent therefrom thirty days, and during said period of time has been and continued within the so-called Confederate States or their military lines, it is ordered that said defendant appear and answer herein within sixty days.

And it is ordered that J. W. Barr, an attorney of this court, be, and he is hereby, appointed to defend for absent defendant, William Preston, in this action.

And afterwards, to wit, on the 21 day of May, 1862, came pl'ff by counsel, and filed in the clerk's office of the court aforesaid the following amended petition, to wit:

Louisville chancery court.

Amended petition.

HENRY A. GRISWOLD
vs.
WM. PRESTON, &c. } Amended petition.

Plaintiff, in amendment of his petition herein, says that since
7 the filing of his petition herein the note for $11,250, in plaintiff's petition mentioned, has fallen due and is unpaid.

Plaintiff says that defendants H. P. Hepburn and Susan Preston, his wife, are non-residents of Kentucky.

Plaintiff asks judgment for his debt against John Preston and attachments against Hepburn and wife, and for all other proper and equitable relief.

SAM. B. SMITH.

Henry A. Griswold says the allegations of the above amended petition are true.

H. A. GRISWOLD.

Subscribed and sworn to this 21 day of May, 1862.

SAM. B. SMITH, *N. P. Jeff. Co.*

Bond ex'd for $22,500; atta. granted for $11,280.

The following attachment bond was executed by the plaintiffs, to wit:

In Lou. chancery court.

Attach bond.

H. A. GRISWOLD, pl'ff,
vs.
WM. PRESTON, &c., def'ts. } Bond.

We undertake that the plaintiff, H. A. Griswold, shall pay the defendants H. P. Hepburn and Susan P. Hepburn, his wife, the
8 damages not exceeding twenty-two thousand five hundred dollars, which they or either of them may sustain by reason of the attachment in this action, if the order therefor is wrongfully obtained.

21 May, 1862.

JOHN P. MORTON.

Attest: WILL. R. HERVEY, *Cl'k.*

Whereupon the following summons and attachment thereon indorsed issued, to wit:

The Commonwealth of Kentucky to the marshal of the Louisville chancery court, greeting:

We command you to summon John Preston and Susan P. Hepburn, to answer an amended petition exhibited against them in our Louisville chancery court, by Henry A. Griswold, (16,946,) and warn them that upon failure so to do for twenty days after service hereof if in Jefferson county, or for thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled, or proof taken, at petitioner's option. And make due return hereof within twenty days from the date hereof.

Witness Will. R. Hervey, clerk of our said court, at the
9 court-house, in Louisville, the 21st day of May, 1862, and in the seventieth year of the Commonwealth.

WILL. R. HERVEY, *Cl'k,*
By N. R. WILSON, *D. C.*

The marshal is directed to attach and safely keep the property of the defendants, H. P. Hepburn and Susan P. Hepburn, not exempt from execution to satisfy plaintiff's claim of $11,280, for debt and probable costs; also to summon the garnishees to answer in the action on the return day hereof, and make due return thereof.

21 May, 1862.

Att.: WILL. R. HERVEY, *Cl'k*,
By N. R. WILSON, *D. C.*

And the same was returned by the proper officer, viz:

M'sh'l's return.

Came to hand 21 May, 1862, at 5.45 o'clock p. m. Executed 23 May, 1862, by delivering a copy of within to Susan P. Hepburn, and by levying subject to attachments 17,046 and 16,641, on the property described in my return in 17,046. Other defendants not found.

W. C. D. WHIPS, *M. L. C. C.*

And afterwards, to wit, on the 4th of June, 1862, came the plaintiff by counsel, and filed in the clerk's office of the court aforesaid the following amended petition, to wit:

10 Louisville chancery court.

Amended petition.

HENRY A. GRISWOLD, pl'ff,
vs.
WM. PRESTON, &c., def'ts. } Petition on further amendment.

Plaintiff, in further amendment of his petition herein, says that the debt sued on accrued in the following manner: Morton & Griswold, of which firm plaintiff was a member, advanced and loaned to Mrs. Susan Prestion Christy, now Hepburn, the sum of money sued for, and took her notes therefor, with Wm. Preston and John Preston sureties.

By an agreement in the dissolution of partnership between himself and John P. Morton, he took the debt of Mrs. Hepburn, then Christy, and by an agreement between him and W. Preston, he, Preston, assumed to pay said debt and executed the note sued on, with Mrs. Hepburn and John Preston sureties. Subsequently, by an agreement between said Wm. Preston and Mrs. Hepburn, said contract was set aside, and the debt again became Mrs. Hepburn's to

Plaintiff says that the debt sued on, tho' it appears to
of said Preston, is in fact the debt of Mrs. Susan
11 He says he has a right to be substituted to said P
right of action against Mrs. Hepburn. He ask
former petition, and for all other proper relief.

SAM. B.

Plaintiff says that defendants H. P. Hepburn and Susan Preston, his wife, are non-residents of Kentucky.

Plaintiff asks judgment for his debt against John Preston and attachments against Hepburn and wife, and for all other proper and equitable relief.

SAM. B. SMITH.

Henry A. Griswold says the allegations of the above amended petition are true.

H. A. GRISWOLD.

Subscribed and sworn to this 21 day of May, 1862.

SAM. B. SMITH, *N. P. Jeff. Co.*

Bond ex'd for $22,500; atta. granted for $11,280.

The following attachment bond was executed by the plaintiffs, to wit:

In Lou. chancery court.

Attach bond.

H. A. GRISWOLD, pl'ff,
vs.
WM. PRESTON, &c., def'ts. } Bond.

We undertake that the plaintiff, H. A. Griswold, shall pay the defendants H. P. Hepburn and Susan P. Hepburn, his wife, the
8 damages not exceeding twenty-two thousand five hundred dollars, which they or either of them may sustain by reason of the attachment in this action, if the order therefor is wrongfully obtained.

21 May, 1862.

JOHN P. MORTON.

Attest: WILL. R. HERVEY, *Cl'k.*

Whereupon the following summons and attachment thereon indorsed issued, to wit:

The Commonwealth of Kentucky to the marshal of the Louisville chancery court, greeting:

We command you to summon John Preston and Susan P. Hepburn, to answer an amended petition exhibited against them in our Louisville chancery court, by Henry A. Griswold, (16,946,) and warn them that upon failure so to do for twenty days after service hereof if in Jefferson county, or for thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled, or proof taken, at petitioner's option. And make due return hereof within twenty days from the date hereof.

Witness Will. R. Hervey, clerk of our said court, at the
9 court-house, in Louisville, the 21st day of May, 1862, and in the seventieth year of the Commonwealth.

WILL. R. HERVEY, *Cl'k,*
By N. R. WILSON, *D. C.*

The marshal is directed to attach and safely keep the property of the defendants, H. P. Hepburn and Susan P. Hepburn, not exempt from execution to satisfy plaintiff's claim of $11,280, for debt and probable costs; also to summon the garnishees to answer in the action on the return day hereof, and make due return thereof.

21 May, 1862.

Att.: WILL. R. HERVEY, *Cl'k*,
By N. R. WILSON, *D. C.*

And the same was returned by the proper officer, viz:

M'sh'l's return.

Came to hand 21 May, 1862, at 5.45 o'clock p. m. Executed 23 May, 1862, by delivering a copy of within to Susan P. Hepburn, and by levying subject to attachments 17,046 and 16,641, on the property described in my return in 17,046. Other defendants not found.

W. C. D. WHIPS, *M. L. C. C.*

And afterwards, to wit, on the 4th of June, 1862, came the plaintiff by counsel, and filed in the clerk's office of the court aforesaid the following amended petition, to wit:

10 Louisville chancery court.

Amended petition.

HENRY A. GRISWOLD, pl'ff,
vs.
WM. PRESTON, &c., def'ts. } Petition on further amendment.

Plaintiff, in further amendment of his petition herein, says that the debt sued on accrued in the following manner: Morton & Griswold, of which firm plaintiff was a member, advanced and loaned to Mrs. Susan Prestion Christy, now Hepburn, the sum of money sued for, and took her notes therefor, with Wm. Preston and John Preston sureties.

By an agreement in the dissolution of partnership between himself and John P. Morton, he took the debt of Mrs. Hepburn, then Christy, and by an agreement between him and W. Preston, he, Preston, assumed to pay said debt and executed the note sued on, with Mrs. Hepburn and John Preston sureties. Subsequently, by an agreement between said Wm. Preston and Mrs. Hepburn, said contract was set aside, and the debt again became Mrs. Hepburn's to pay.

Plaintiff says that the debt sued on, tho' it appears to be the debt of said Preston, is in fact the debt of Mrs. Susan P. Hepburn.

11 He says he has a right to be substituted to said Preston in his right of action against Mrs. Hepburn. He asks as in his former petition, and for all other proper relief.

SAM. B. SMITH.

H. A. Griswold says the allegations in the above petition are true.

H. A. GRISWOLD.

Signed and sworn to this 4th day of June, 1862.

SAM. B. SMITH, *N. P. Jeff. Co.*

Ord. app'ce.—H. P. Hepburn and Barr, att'y.

And at a court held as aforesaid on the 6 day of June, 1862, came plaintiff by counsel, and on his motion, it appearing to the court that defendant H. P. Hepburn is a non-resident of this Commonwealth, it is ordered that said defendant appear and answer herein within sixty days.

And it is ordered that J. W. Barr, an attorney of this court, be, and he is hereby, appointed to defend for non-resident defendant, H. P. Hepburn, in this action.

Note filed with petition.

The following is the note referred to and filed with petition herein, on the 26 December, 1861, to wit:

$11,250. LOUISVILLE, *Ky., June* 20, 1860.

12 On the 20 day of February, 1862, for value received, we, William Preston as principal, and Susan P. Christy and John Preston, jr., as sureties, jointly and severally promise to pay to Henry A. Griswold or order, eleven thousand two hundred and fifty dollars, negotiable and payable at the Bank of Kentucky.

W. PRESTON.
SUSAN PRESTON CHRISTY.
JNO. PRESTON, JR.

At a court held as aforesaid on the 18 day of March, 1864, came H. P. Hepburn and wife, and filed their joint answer herein; which answer is as follows, to wit:

Louisville chancery court.

Answer of Hepburn and wife.

H. A. GRISWOLD, pl'ff,
vs.
W. PRESTON, &c., def't. } Answer.

H. P. Hepburn and Susan P. Hepburn, late Susan P. Christy, for answer to pl'ff's petition herein say that it is true they assumed to pay to pl'ff the note mentioned in his petition; they state that on the day of March, 1864, they tendered to pl'ff the sum of $12,720

13 in legal-tender treasury notes of the United States of America, which amount was the full amount of pl'ff's debt, interest, and costs, but that defendant failed and refused to receive the same. Defendants have been ever ready since the said day of March,

1864, to pay said debt, interest, and costs, and now tenders and pays here in court the said sum of $12,720, which he asks may be taken as full satisfaction of pl'ff's debt, interest, and costs. They ask that pl'ff's attachment be discharged, that said debt be entered satisfied, and for all proper relief.

JNO. W. BARR.

Mo. to enter satisfaction and sub.

And at a court held as afores'd on the 18 March, 1864, came H. P. Hepburn and wife, by counsel, and tendered to pay into court twelve thousand seven hundred and twenty dollars in United States treasury notes, and moved the court that the same be taken in full satisfaction of plaintiff's debt, interest, and costs herein; and said motion coming on to be heard was submitted, and the court not being advised took time, &c.

Opinion of court.

At a court held as aforesaid on the 15 day of April, 1864, the question here raised as to the constitutionality of the act of
14 Congress making the notes paid into court a legal-tender in payment of debts is now before the Supreme Court of the United States, which is the only tribunal that can finally settle this question. The court of appeals in New York and the supreme court of Massachusetts have decided that the act of Congress is constitutional, and the decision of this court on this subject could not be taken to the Supreme Court of the United States, and would not make an end of the national question. Resolving all doubts in favor of the Congress in these times of trouble, unforeseen by our fathers, and which now astonishes the civilized world, I shall order the judgment to be satisfied by these notes.

It is therefore ordered that plaintiff's claim herein be, and the same is, fully satisfied and the attachment herein discharged, and pl'ff has leave to withdraw the fund in court.

Appeal granted.

And then came plaintiff, by counsel, and excepted to the ruling of the court herein, and prayed an appeal to the court of appeals, which is granted.

15 *Supersedeas bond.*

The following supersedeas bond was executed by plaintiff herein, viz:

H. A. GRISWOLD, appellant,
vs.
WM. PRESTON, &c., appellees. } Upon an appeal from a decree in the Lou. ch'y ct.

Whereas said appellant has taken an appeal from a decree of the Louisville chancery court rendered on the 15 day of April, 1864,

against him in favor of the said appellee in ordering the judgment herein to be entered satisfied by the payment of legal-tender United States treasury notes, and in discharging the attachments in this cause; and the said appellant desires to supercede the said decree: Now we, the said appellant, as principal, and , as surety, hereby covenant to and with said appellees that the said appellant will pay to appellees all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the said decree in case it shall be affirmed, and any judgment or order which the court of appeals may render or order to be rendered by the inferior court, not exceeding the amount or value of
16 the decree aforesaid, and also pay all rents, hire, or damage which, during the pendency of the appeal, may accrue to any of the property of which the said appellee may be kept out of possession by reason of the appeal.

Witness our hands this 20th day of April, 1864.

H. A. GRISWOLD. [L. S.]
ERVIN MORRIS. [L. S.]

Att.: HARRY STUCKY, *Cl'k.*

STATE OF KENTUCKY, *Louisville chancery court, sct:*

I, Harry Stucky, clerk of the court aforesaid, do hereby certify that the within and foregoing seventeen pages contain a full, true, and complete transcript of the record and proceedings had between the parties therein named as directed to be made for the court of appeals.

Witness my hand this 21st day of April, 1864.

Att.: HARRY STUCKY, *Cl'k.*

Fee, $4 25.

17 On the 3d day of May, 1864, the foregoing transcript was filed in the clerk's office of the court of appeals of Kentucky, by Jno. W. Barr, esq., counsel of appellant, in the style of Henry A. Griswold, appellant, *vs.* H. P. Hepburn and Susan P. Hepburn, his wife, appellees.

And on the 15th day of Sept., 1864, said cause was submitted to said court for judgment.

And on the 17 day of Sept., 1864, the court of appeals of K'y rendered the following opinion and mandate herein:

18 State of Kentucky, court of appeals, June 17, 1865.

H. A. GRISWOLD, appellant,
vs.
H. P. HEPBURN *et al.*, appellees. } Appeal from Louisville chan'y court.

The court being sufficiently advised delivered the following opinion herein, to wit:

The only question involved in this appeal is the constitutional validity of so much of the congressional statute of the 25th of February, 1862, as enacted that "United States treasury notes (authorized by it) shall also be lawful money and a legal tender in payment of all debts, public and private, in the United States."

A solution of the grave and apparently difficult problem now, for the first time, presented for the consideration of this court, has been attempted by several of the State Tribunals whose opinions have been various in reasons, and to some extent conflicting in conclusion. And as the great controversy, thus far presenting such manifold phases, can be finally concluded only by the judicial organ of all the people
19 of all the States, and as, therefore, no transient opinion of the appellate court of Kentucky can ultimately have any authoritative effect, we had hoped that we might be spared the peculiar responsibilities of announcing our own judicial conclusion on a subject as important to constitutional liberty and union as any ever presented to the American judiciary. But neither duty nor propriety will permit evasion or longer delay; and now, in reluctantly approaching a question of so much magnitude in principle and so momentous in its bearing on the consistency, stability, and practical supremacy of the Federal Constitution, our only fear is that we may not be able to divest our judicial mind of all extraneous influence, and, with perfect impartiality, looking to the Constitution and its historic interpretation alone, expound it truly for the welfare of the country and the security of posterity. The political mechanism of the United States is a simple dualism consisting of separate State governments for all local concerns, and a common government for all national affairs.

The Constitution of the United States defines the spheres of
20 each of these forms of government, and in it the people of the State, who, as pre-existing sovereignties, made it, reserved to themselves all powers not transferred by it, and declared that, in the ultimate sense, it shall be the supreme law of the land. As thus defined each State government possesses the inherent sovereignty of its local constituency modified by the delegation of all national power to the general government, and by the limitations of their common Constitution. Our unique system—federo-national—is therefore appropriately styled "Imperium in imperio," and theoretically resembles the simplicity and harmony of the solar system, whose separate planets revolve in their own distinct orbits around their own central sun. This new and beautiful organism is yet in the course of practical development which may soon prove whether its fundamental equilibrium of local and national power is in most danger of disturbance from the centrifugal tendencies of the States, or the centripetal attractions of the central government. To preserve the constitutional balance, hitherto deemed indispensable to union and security, each govern-
21 ment must, as their organic law contemplates and enjoins, confine its action within its own allotted sphere, and never cross the boundary line of their respective powers. Their common judiciary is their organic guardian of that sacred line, and no human tribunal was ever endowed with a higher power or instrusted with a more responsible duty. Tranquillity and fraternity demand that the general government especially should carefully abstain from the assumption of undelegated power, and the exercise of even a doubtful power which might jeopard the reserved rights of the States. And consequently as it is the duty of the judiciary to

pronounce the law in every judicial case, and as no act of Congress not authorized by the Constitution can be law, fidelity to official trust requires every court to adjudge any such act unconstitutional and void, and even to withhold its sanction and co-operation in every obscure case, unless it can see some satisfactory reason for admitting the constitutionality of the questionable act. When twilight vexatiously obscures the boundary between national and State power, there may be imminent danger, and especially in sea-
22 sons of tempting disturbances by war or otherwise, of encroachment on the reserved rights of the States whereby our federal system might be dislocated and its harmony, so essential to union, might be destroyed. To prevent such a national catastrophe, the judiciary should be slow to enforce an adventurous act pregnant with so much peril and of such doubtful authority. But the same reason being applicable to State legislation of doubtful compatibility with a State constitution, proper deference to the legislative department should preponderate in favor of the constitutionality of its acts, and require the judicial department to recognize them as laws unless it shall be clearly satisfied that they are not.

Wherever a jurist inquires whether a State statute is consistent with the State constitution he looks into that constitution, not for a grant, but only for some limitation of the power inherent in the people's legislative organ so far as not forbidden by their organic law. But as Congress derives its power from grants by the people of pre-existing State sovereignties, an enlightened inquirer into the constitu-
23 tionality of any of its acts looks only for a delegation of power by the Federal Constitution; for that Constitution expressly declares that all power not delegated by it is reserved to the States or to the people. In this class of cases, therefore, he who asserts the power holds the affirmative, and, unless he maintains it, the controverted act should not be enforced as law by the judiciary. On the contrary, the party affirming that a legislative act of a State is prohibited by the State constitution must prove it, and unless the proof be clear, the contested act must be admitted to be law. The distinctive difference between the two classes of cases is that in the former the power must be shown to have been delegated, but in the latter it must appear to have been prohibited. And, in this case, therefore, the power to pass the tender act must satisfactorily appear to have been delegated before the judiciary should recognize and enforce it.

But express power to attain a designated end, or fulfil a specific trust, necessarily implies the subsidiary power to employ the means necessary for effectuating the contemplated end, excepting
24 only so far as a particular means may be inconsistent with the charter of authority, and this clear principle of philosophy, applicable to political as well as to personal trusts, is expressly recognized and confirmed by that provision of the Federal Constitution which, immediately succeeding the enumerated powers, declares that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing power."

To avoid controversy or doubt this clause was adopted, not as a

grant, but only as an authoritative recognition of the necessary existence and true range of incidental powers too numerous and various for specific enumeration; and consequently this fundamental declaration never enlarges nor contracts the specific powers expressly granted, but only certifies and defines the natural and necessary sphere of implied powers, which are as much delegated as the express powers to which they are properly subservient as means to ends. These means must be both necessary and proper, and what are such means may, in nearly all instances, be freed from rational doubt by a logical test consistently applied.

Indispensable is neither the popular nor the constitutional
25 sense of the simple word "necessary." No one mean can be indispensable, if any other mean could attain the same end; and therefore there could be no implied power in any case if none but indispensable means were constitutional. But all means relating to the end of any express power and conducive to the execution of it, are, in the constitutional sense, "necessary means;" and among all such adaptable means Congress may choose any one which, in the exercise of a sound discretion, it may deem most befitting. Over that choice—whether wise or unwise, politic or impolitic—the judiciary has no jurisdiction. Its revisory cognizance is confined to questions of power, and can never, without usurpation, be extended to questions of policy or expediency; and while, in this case, this court cannot consider the expediency or inexpediency of the tender act, it may and must decide whether it was an unprohibited mean adapted to the end of any express power.

"Proper" is neither synonymous with "necessary" nor a superfluous addition to it, as it would be if it import merely fitting, or appropriate, or adaptable, which is the meaning of "necessary." But as a chosen mean may be prohibited by the letter or the spirit
26 and aim of the Constitution, however adaptable and in that sense "necessary," it cannot be "proper," and therefore it must be adjudged unconstitutional as being thus prohibited. The true test of implied power is, whether a preferred mean is adapted to the end of an express power, and is also unprohibited, or, in other words, is congenial with the spirit and purpose of the Constitution. This test constructively excludes from "necessary and proper means" all power that is intrinsically substantive and independent, the nondelegation of which implied that the States and people intended to reserve it to themselves, or, in any event, to withhold it from Congress.

The incorporation of the National Bank of 1816 raised this very question, in the great case of McCullough *vs.* Maryland, in which the Supreme Court of the United States decided that the bank incorporation was a necessary and proper means to the end of safely keeping and transmitting the public money; and Chief Justice Marshall, considering the power to incorporate as not substantive and independent, but necessarily a means only to the end of some such express powers, said: "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes,

or regulating commerce, a great, substantive, and independent
27 power which cannot be implied as incidental to other powers,
or used as a means of executing them." All such power is itself an end and not a mean to the end of any express power, and therefore cannot be implied.

And truly, had no express power been granted to declare war, levy taxes, and regulate commerce, there could have been no implied power to do either of those things; but each of these independent powers would have been undoubtedly retained by the States and impliedly forbidden to Congress. And what can be more substantive and independent than the most vital of all commercial powers—the power to make and regulate a nation's money? This power is everywhere treated as one of the highest and most essential attributes of national sovereignty, and could not be admitted as an implied power in Congress any more than the power to declare war or regulate commerce could be so held to be in the absence of any express power; and the power over tender is equally substantive, for it may control and nullify the other.

The test of national power, as thus substantially defined, is established by reason, and, still more authoritatively, by the undeviating concurrence of the judiciary to the State and national; and it is the
only safe or consistent criterion for a uniform and stable con-
28 struction of our national Constitution. Without this guide the charter of the Union, like a rudderless ship, would fluctuate between the Scylla of strict and the Charybis of latitudinarian interpretation; and then, its essential end of certainty and uniformity being frustrated, it would become the victim of circumstances, and be often moulded by passion or policy. Expediency and power are too often confounded as synonymous. They are widely different. Expediency is uncertain; the Constitution certain. Expediency changes; the Constitution never. Expediency bends to circumstances; the Constitution, exalted high above them by the people, never bows to men or times.

Constitutional discretion cannot do whatever may promote "the general welfare." Express power to promote the general welfare, has not, eo nomine, been given. Such specific power would have devoured all the other powers and resolved the national government into despotic anarchy.

The declared object of the express power to levy taxes was "to provide for the common defence and general welfare," which can only be done by the exercise of the delegated powers. The general welfare is not a power, but only the purpose of the constitutional exercise of the powers granted.

The fact that a measure may promote the general welfare
29 neither proves nor, per se, tends to prove that Congress may enact it as law.

Uniformity in the law of wills, conveyances, and other contracts in all the States might, and probably would, tend to the general welfare. But the States choose to retain, each for herself, the power to regulate that matter in their own way. So, too, some of our wisest

patriots think that the general welfare would be promoted by the abolishment of slavery. But surely Congress has no legislative power over that domestic institution in the States.

Nor does the impolicy of a legislative act prove its unconstitutionality. Many enactments have been unwise and nevertheless constitutional. Within the limits of the Constitution legislative discretion is law; but, beyond that conservative boundary, it is a lawful brutum fulmen, totally destitute of authority.

The people of the States adopted their federal charter as moulded in such form and animated with such a spirit as they thought best for securing their common liberty and progress, and for saving themselves and posterity from the anarchy of vagrant legislation on the capricious plea of mere expediency and the general welfare. And, to secure that great end, the test just indicated must always
30 inflexibly guide legislators and judges as the best and only safe cynosure of constructive power. That pole-star will never decoy nor deceive. Guided by the chaste light of that lone star, we will proceed to analyze the power assumed to pass the legal-tender act of February, 1862.

As every contract and every judgment for money will be legally discharged by the payment of money, just as every contract and judgment for any other thing itself, therefore, proprio vi, money will necessarily be a lawful tender, without any legislative enactment for legalizing it as such, consequently, if the currency called "United States treasury notes" can be legally held to be "money," as declared by the act of February, 1862, the further declaration that it should be a legal tender in contracts and judgments for money was an act of supererogation; for, being money, makes them a legal tender without the superfluous enactment to the same effect; and, unless they constitute money, they are not a legal tender for money due, and no act of Congress can make them so without impairing the obligation of contracts and otherwise assuming powers never delegated. And seeming conscious that nothing but money could be made a tender for a debt due in money, Congress saw fit, as a necessary
31 preliminary to declare United States treasury notes "to be money." Whether in the technical and constitutional sense of money, that act made them money, is the radical question.

Money being the universal standard of value and measure of exchange, foreign and domestic, to make and regulate money is, as before suggested, one of the highest and most essential attributes of national sovereignty; and the harmony and prosperity of the United States especially require that the legal currency should be the same in all the States, and be made as uniform and stable as possible. Being, therefore, a national concern of vital interest, the national will should exclusively control the money of the United States. The people of the old confederate States, having learned this wholesome lesson by an afflictive experience, unanimously surrendered all State power over the currency, and magnanimously transferred it to the national Congress, to a prudently circumscribed extent, by the following provisions in the Federal Constitution they adopted: "Con-

gress shall have power to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures." "No State shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts."

32 If, as some few persons have argued, "to coin money" is a carte blanche allowing Congress to make or to declare anything money it may choose for the national currency, then there is express power to issue treasury notes, and declare them to be money, and as a necessary sequence, a lawful tender. But this comprehensive construction is, in our judgment, unauthorized by the letter, and irreconcilable with the motives and the purpose of the quoted clauses. "To coin money" clearly means to mould into form a metallic substance of intrinsic value and stamp on it its legal value, so as to encourage and facilitate its free circulation and assure stability in the currency. The thing so coined is itself money, ipse loquitur. But a treasury note is only a promise to pay money, and at the utmost, can only be like a bank bill or a bill of exchange, a representative of money; and it is even less a representative of money than such bills; for, while these must be paid in money, the treasury notes are payable in other promises in the same form. This literal import of the words "to coin money" is persuasively fortified by the accompanying power to regulate the value "of foreign coin."

33 When the Constitution was adopted, as even yet, all foreign money was metallic coin; and, therefore, the power to regulate such coin was constructively restricted to coined metal, and did not include notes on the Bank of England, or consols, or other government bonds or securities. The conclusion is plain, and apparently inevitable, that the power to coin money was intended to mean to coin metal as the money of the United States; and the curse of the paper currency of the revolution, the fiscal ruin of the confederation, and the history of the adoption of the Federal Constitution conduce strongly to prove that, when the people who adopted it delegated to Congress exclusive power "to coin money," they intended that nothing else than metallic coin should be money, or be a legal tender in invitum as money; and it is almost certain that they did not intend to confer on Congress any more, or other power to make money, or declare anything else to be money, or compel the circulation of anything else as money.

During the revolutionary war with England each State had its own peculiar currency, consisting chiefly of its own bills of credit, which depreciated so rapidly as soon to become worthless, and the currency of no one State would circulate in any other State or else-

34 where. Continental bills, issued by the confederation, also became so valueless as to frustrate regular commerce, bankrupt citizens, and produce general embarrassment and universal vexation and distress in all the States.

This paper currency excluded from circulation all coined money, as such currency always has done and always will do. Gold and silver coin possesses an intrinsic value nearly equal to its denomination, and is uniform throughout the commercial world. To insure its

universal circulation without discount, no tender law is ever necessary, and, not depending on the credit of corporations or governments, it is not subject to the injurious fluctuations of a paper medium of no intrinsic value, which, upheld only by an uncertain and vibrating public opinion, cannot operate as a safe and uniform standard of value at home nor abroad. And Thiers, in the second volume of his French Revolution, says this was so during the disturbing prevalence of assignats and mandates, which proved so destructive in France. Even England, with her strong backbone of financial credit, burdened with the heavy pressure of the French revolution, which necessitated a compulsive suspension of specie-payments by her great bank, never
35 declared its notes to be money, and her omnipotent Parliament, though unrestrained by the American check of fundamental law circumscribing its power, were too statesmanlike and self-denying to make them a legal tender. Nor under all its besetting temptations did the Congress of the confederation, with express power to emit bills of credit, ever issue them as money or a legal tender. These, like multitudes of other historic examples, illustrate the great practical difference between coin and paper money, and credit, as fully tested by the experience of mankind. And in no portion of the world, or period of its history, was this probation ever exclusively effectual than in our own country for many years of sore trial preceding the adoption of the Federal Constitution. When this Constitution was adopted a large majority of the people were inflexibly opposed to all "paper money," and looked to the precious metal as the only hope of an equable and universally accredited currency.

The debates in the convention echo that sentiment, and its offspring was coined money as established by the Constitution The articles of confederation gave to its Congress power "to coin money and emit bills of credit." The same power was transcribed
36 into a draft of the present Constitution. But, on the motion of Governeur Morris, the power "to emit bills of credit" was stricken out by a large majority, and the power "to coin money" was left, as it now stands, alone. The following extracts from the debate on that motion will show the motive for that decision. Mr. Morris said that "if the United States had credit, such bills would be unnecessary; if they had not, unjust and useless." Mr. Madison, afterwards President of the United States, said, "will it not be sufficient to prohibit the making them a tender? This will remove the temptation to emit them with unjust views; and promissory notes, in that shape, may, in some emergencies, be best."

Mr. Gorham said he was "for striking out without any provision. If the words stand they may lead to the measure."

Mr. Mason expressing doubts and unwillingness "to tie the hands of Congress," said: "Congress (he thought) would not have the power unless it were expressed."

Mr. Gorham again said: "The power (of emitting bills,) so far as it will be necessary or safe, is involved in that of borrowing money." That is, to issue government notes, but not to force their circulation, by declaring them money nor making them a legal tender.

37 Mr. Ellsworth, (afterwards chief justice of the United States,) said he "thought this a favorable moment to shut and bar the door against paper money." The mischief of the various experiments which had been made were now fresh on the public mind, and has excited the disgust of all the respectable part of America. "By withholding the power from the new government, more friends of influence would be gained to it than by almost anything else. Paper money can in no case be necessary. Give the government credit, and other resources will offer. The power may do harm, never good."

Mr. Wilson, afterwards a judge of the Supreme Court of the United States, said that "the striking out would have a most salutary influence on the credit of the United States. The expedient will never succeed whilst its mischiefs are remembered, and as long as it can be resorted to, it will be a bar to other resources."

Mr. Butler suggesting that paper currency was not a legal tender anywhere in Europe, expressed anxiety for denying Congress the power to declare it money or make it a legal tender.

Mr. Read said: "Unless the power to emit bills for currency
38 should be stricken out, it would be as alarming as the 'beast in revelation.' "

Mr. Langdon declared that he would rather reject the whole plan than retain the three words "and emit bills." On the sentiments and for the purposes thus indicated, the proposed power to emit bills of credit was repudiated by the vote of nine States against the vote of New Jersey and Maryland.

These contemporaneous facts are recorded in the 3d volume of the Madison Papers, pp. 1,343, '4, '5, '6, and the debate on both sides shows that while a minority of the convention were in favor of vesting Congress with the supplemental power to issue bills for conventional circulation merely, not a single member, except perhaps Mr. Mercer, seemed willing to intrust Congress with power to make that currency money or a legal tender. And in a note appended to the 1,346th page, Mr. Madison said that he acquiesced in the vote of the majority, because he presumed that "withholding the express power to emit bills of credit" would not disable the government from the use of public notes as far as they could be safe and proper, and would only cut off the pretext for a paper currency, and particularly
39 for making the bills a tender.

"Currency" is not necessarily "money;" whatever circulates conventionally on its own credit as a medium of exchange, whether it be bank notes, bills of exchange, or government securities, being thus practically current, is properly "currency." But such currency merely spontaneous is not "money," which is the legal medium of exchange, and the only true standard of value. And this distinction between money and currency seems to have been understood by the whole convention, which proposed the constitution to the States for their ratification, the minority proposing to vest Congress with power to supply a paper currency, only as a voluntary medium of exchange, leaving the constitutional coin as the only money and only legal tender. And the ratifying State conventions seemed

to contemplate the subject in the same light. The denial of the power to emit bills of credit does not appear to have been even objected to in any State convention. And history indicates that had the constitution granted that power it would have been rejected by a majority of the States. The inevitable conclusion from this extraneous but incidental and illustrative evidence is, that the people
40 in adopting the Constitution intended with singular unanimity to withhold from Congress, as well as from their own State legislatures, the power to issue "paper money," or make anything else than coined money a legal tender. But the face of the constitution drives inevitably to the same conclusion. The power to coin "money" is the only money-making power delegated to Congress. Without express grant Congress could have had no power whatever over money. The only grant made is specific and well defined, and beyond this Congress can have no express authority to go, and any attempt to go further would defeat the great purpose of defining and establishing coin as the money of the United States; and therefore, and also because no such substantive power to make anything else than coin money, knowing that Congress could have no power over money, except so far as delegated, the people chose, for national reasons, to delegate the single power "to coin money," and there stopped; and, anxious to maintain coin as the only money, they tied the hands of their own legislatures, and not only abandoned all their inherent power over money except a qualified power over the legal tender, expressly restricted to gold and silver, but for the same im-
41 mutable reason withheld from Congress any power over tender. That renunciation of their absolute power and reservation of a qualified power over tender, is itself and alone sufficient proof of a constructive and proposed denial to Congress of any power over it; for, as such power in Congress would necessarily be exclusive and paramount, the exercise of it would supersede or control all State power over tender, and therefore the qualified prohibition against the States would have been superfluous, idle, and inconsistent. But that prohibition as qualified is an acknowledgment of the power of the States, and the only object of it was to limit that retained power so as to prevent any legislative interference with the only money permitted to be made a tender in the United States. Consequently the people of the States by retaining power over tender, and granting none to Congress, constructively denied to Congress any implied power on that subject, and the conclusively fortifies the deduction from other reasons, that they intended that nothing but coin should ever be made money or a legal tender as such.

And if this be not true, why did they adopt the quoted prohibitions on their own power, and why grant the specific power
42 only? If they intended that Congress should have any more power over money, why did they not make the grant more comprehensive? Only and certainly because they intended that nothing but coin should ever be made legal money or tender, either by their own legislatures or by Congress. And to prevent a frustration of their great purpose as to an uniform money standard of value, they intended

that Congress should not any more than their own legislatures have any implied power over money or tender for money.

The States abandoned their power to make anything but gold and silver a tender in payment of debts contracted even under, and therefore regulated by, their own local laws, because the exercise of that abdicated power might defeat the national purpose of maintaining the currency and stability of the only legal money. And why should Congress claim such an undelegated and suicidal power? And whence does it derive it? Not from express grant, for that is constructively negatived; nor from implication, for such control over money and contracts can never be implied even if there be no constructive negative of it; and if it possess any such power its implied powers are unlimited by any constitutional test uniformly applicable.

43 But it is said that Congress has more than once with general approval and universal acquiescence, exercised that power by declaring that when the intrinsic value of gold and silver coin had been slightly reduced, it should still as before, be a tender for its stamped value. The constitution having made such coin money and thereby a tender by rule, without any aid from Congress, it must have continued a tender in the same mode. These unnecessary acts of Congress were therefore only declaratory. They did not make the modified coin a tender; it was so independently of them, and would have been as much so without their sanction as with it, and were this not so, it would not even now be a legal tender. This sham precedent therefore is neither authoritative nor in the slighest degree even argumentative. The possibility of a debasement of coin is also urged to show that the uncertain fluctuation in the value of a paper currency will not justify the presumption that it should never be money as well as the coin which is also subject to depreciation and occasional oscillation. As this assumption could not affect the con-

44 struction of the Constitution either on its history or its face, an answer is scarcely pertinent. But we will just say that a debasement of coin for the wanton purpose of degrading it is a crime so rare and disgraceful as not to be apprehended in an age of christian light and morality, and, moreover, that a prudent alloy but slightly reducing the intrinsic value of coin would scarcely, and but transiently, deteriorate it as a standard of value, and would still leave it more equable and valuable than any other medium or standard

Thus history and the Constitution itself sufficiently prove that when the people of the States transferred their confederation of independent States into one supreme nationality of delegated and defined powers, their great charter of union not only transferred no more power over money than to coin it and regulate the value of coin, but, lest the purpose of that limited power might be defeated by their own conflicting legislation on the currency, they buried all their local power over money; and it seems to us that they contemplated gold and silver coin as the only constitutional money or legal tender, for the following reasons:

45 1st. When the Constitution was adopted the precious metal constituted the money of the civilized world.

2d. No other material combines the same elements of value, durability, and convenience, all essential to an international currency and measure of value, to secure which from all disturbing interference was the object of granting to Congress the power to coin money, and of confining money to coin. And

3d. The interdiction of State power to make anything but gold and silver a tender for debt and the studied omission to give to Congress any power over the law of tender, clearly imply that gold and silver were intended to be the only money of the United States; for, if anything else should ever become money, it would thereby necessarily become a legal tender, and the States would be bound to declare it such and make creditors take it as money.

Without the constitutional prohibition the States might make anything else a tender as well as money, and thereby defeat the only purpose of giving to Congress the exclusive power to coin money alone. It was therefore unnecessary to confer on Congress power to make such money a tender, and it would have been inconsistent with the great popular purpose of the only power over money to give to Congress the cormorant power to make bills of credit on any paper effigies a legal tender.

46

As some confirmation of our opinion on the subject, we presume to quote a concurrent opinion of an illustrious jurist who, if not, as often styled, the defender of the Constitution, was unquestionably among its most enlightened interpreters and consistent champions:

"Currency, in a large and perhaps just sense, includes not only gold and silver and bank bills, but bills of exchange also. It may include all that adjusts exchanges and settles balances in the operations of trade and business. But if we understand by currency the legal money of the country, and that which constitutes a lawful tender for debts and is the statute measure of value, then, undoubtedly, nothing is included but gold and silver. Most unquestionably there is no legal and there can be no legal tender in this country, under the authority of this government or any other, but gold and silver, either the coinage of our own mints or foreign coins at rates regulated by Congress. This is a constitutional principle, perfectly plain, and of the very highest importance. The States are expressly prohibited from making anything but gold and silver a tender in payment for debts; and, although no such express prohibition is applied to Congress, yet, as Congress has no power granted to it in this respect but to coin money and regulate the value of foreign coins, it clearly has no power to substitute paper or anything else for coin as a tender in payment of debts and discharge of contracts."

47

"The legal tender, therefore, the constitutional standard of value, is established, and cannot be overthrown. To overthrow it would shake the whole system."

These are the recorded sentiments of Daniel Webster.

And in the U. S. *vs.* Marygold, 9th Howard, 567, the Supreme Court characterizing the money power of Congress as a great trust, said that it involves "the duty of creating and maintaining a pure and uniform metallic standard of value throughout the Union." The

trust could never be fulfilled if paper currency could ever be made a legal tender. But in establishing, beyond legislative interference, gold and silver coin as the only legal money of the United States, the people did not contemplate the total exclusion of a paper currency, which they knew to be a
48 useful and even a necessary auxiliary of commercial exchanges, progressively multiplying and expanding. While, with a full perception of the essential difference between currency and money, they fixed gold and silver as the only money, still they expected, as both useful and inevitable, the spontaneous circulation of bills of exchange, government bills, and even bank bills. History attests this, and the debates in convention prove it. They also certify the decisive fact that not one member, except perhaps one, intended or desired that Congress should have power to enforce such a circulation by declaring paper of any sort money, or making it a legal tender.

Banks, both national and local, may be constitutional. No power could be more conclusively settled by reason, authority, and time than that of establishing a national bank. And, although no State has authority to "emit bills of credit," defined in Craig *vs.* Missouri to be bills issued by a State on its own credit, for the purpose of circulating as money, yet any State may incorporate natural persons for banking purposes; for, as the only object of such a charter is to impart legal individuality to a multitude of natural persons,
49 and limit their inherent right to loan their own money and issue their own notes, therefore the corporation does not devise from its charter the power to lend money and discount bills, and the bank notes are not interdicted "bills of credit;" consequently such notes, though neither actually nor potentially money, may be as legal a currency as bills of exchange, and this, therefore, is prescriptively settled. So, too, Congress had authority to issue treasury notes on the national credit as "necessary and proper means" for fulfilling "the end of the express" power to borrow "money." And, according to the government credit, they might lawfully circulate as voluntary currency, and in that conventional character might constitutionally pay duties, taxes, and all the public expenses, civil and military. But apprehending a ruinous depreciation if left to depend on their own intrinsic credit. Congress, in the hope of elevating them to a higher and more uniform standard, thought fit to declare them money. Its power to do that is now the question. Some of the advocates of the power defend it by a vague and fervid declamation which the judiciary should never hear or heed. They appeal to the transcendental law of necessity, and assume that the act declaring treasury notes money, and making them a legal tender in pay-
50 ment of private debts for enforcing their circulation as money, was indispensable to the salvation of the life of the Union, and did in fact save it. This forlorn plea is not sustained by either reason or history.

Was the credit of the government, with all its manifold and immense resources, so low or sinking so fast as to require the prop of the

tender act? No, and truth echoes everywhere no. Was unlimited taxation a barren or an unavailable power? And might not a judicious resort to that resource, aided by other ample means, have secured the credit of the government and more certainly than the tender act have upheld its treasury notes? And would not such a draft on the property of the people in proportion to their means have been far more equally distributive of the common burthen than that which was imposed chiefly on one class?

With the full benefit of the tender screw, treasury notes sank below the alarming mark of more than two for one, and the heavy loss fell, not on the government only, but also on the laboring classes, and peculiarly and unequally on the creditor class. Had Congress, instead of trying the tender expedient, the constitutional availability of which was generally distrusted, properly increased the
51 taxes and pledged the public revenue and lands, in the security of which all would have trusted, treasury notes would have been much more accredited; or had it made those notes, like the "five-twenty" bonds, draw a moderate interest, this alone, without increased taxation or coercive tender, would have prevented their depreciation to so low an ebb as that to which, with the tender prop, they were doomed to fall. This is well illustrated by the historic fact that interest-bearing bonds, which were never made a tender, always stood higher than the tender notes. But had augmented taxation and plighted revenue and lands and interest-bearing notes been combined, who could doubt that the notes would have maintained a much higher and more equable standard of value than they did?

Then, although the issue of treasury notes became necessary for the suppression of the rebellion, yet how or in what degree did it actually contribute to its salvation. The impartation of that quality may have promoted the circulation of the notes and facilitated the payment of private debts, but how far the increased circulation and more easy payment of the people's debts aided the government, no one can tell. We cannot see that it was necessary to save the
52 Union, nor can we believe that without it the rebellion, unsupported as it was by equal money or credit, could ever have succeeded; and we feel quite sure that it might have been more easily and economically suppressed had the tender been omitted and other and better means, as just suggested, been employed.

But even if that experimental expedient alone had been the most hopefully efficient, and had all the virtue which has been imputed to it, the concession of that fact would not prove the constitutionality of the tender act; for expediency is not power, nor is necesssity a law to the judiciary.

The salus populi may excuse usurpation, but can never make it law in this country, where it is our birthright to claim and to enjoy the protection of a more supreme law, which recognizes no such plea as necessity, and where we all know that usurpation for any cause is insurrectionary on principle, and, if connived at by the judiciary, revolutionary in fact. "Military necessity" may, more than any

other, command a temporary submission to usurped power; yet the Constitution, recognizing no such law, should finally triumph through an independent judiciary, which will sooner or later right the
53 wrong. And whatever may be occasionally said or thought to the contrary, it is a gospel truth that the ultimate welfare of our people depends on the integrity and practical supremacy of their fundamental law.

Then, having defined implied power, and shown, as we think truly, that all claim to such power must harmonize with the spirit and design of the Constitution, and having also endeavored to prove that the history and context of that organic law constructively allow nothing to be made money except gold and silver coin, and forbid a compulsive tender of anything else than such money, we now finally inquire how or whence did Congress derive the power to make treasury notes money, or a lawful tender for money? This power is claimed as incidental to some one or all of the express powers—to declare war, to regulate commerce, and to borrow money.

Unless we are greatly mistaken in the foregoing outline, this power is not constitutionally incident to any of these express powers, nor to all of them together. It is not a "necessary and proper" mean to the constitutional end of any one of them.

The power to regulate commerce does not extend to the internal commerce in a State, and therefore cannot apply to contracts growing out of any such local intercommunication. Nor does it
54 carry with it the power to create the medium of exchange, foreign or domestic. That is fixed by the constitution; and, moreover, a fluctuating paper currency deranges and cripples commerce instead of regulating it. War cannot give to Congress any power not conferred by the Constitution. It may afford occasions for the exercise of some power dormant in peace, but it cannot give any power not delegated by the Constitution, nor especially any prohibited by its letter or its spirit, which are the same at all times, and theoretically as supreme in war as in peace, and as much so over soldiers as citizens, over armies as legislatures. If this be not true, the powers of war may become omniverous.

In times of popular effervescence or the turbulence of war in any of its forms, and especially in that civil strife, the liberty and security guaranteed by the Constitution are in much more danger than in the tranquil season of peaceful repose; and the practical supremacy of fundamental principles is far more needful when tumultuous passions agitate the popular mind than when its calm reason rules. And therefore the Constitution was made more for stormy than quiet times, and should, as certainly and constantly operate su-
55 premely. The government, through its Congress or its army, has no more rights in war than in peace to take private property without just compensation, which can be measured only by proof, to decide on which is a judicial function wisely withheld from the legislative department, and the assumption of which by it would make this cherished guaranty a mockery and frustrate its conservative aim.

If, therefore, Congress in peace cannot make any other kind of money than gold and silver, or force anything else as a tender for money, no such attempts would be legalized by war. But war created the necessity and furnished the occasion for the exercise of the power to borrow money, which was lawfully done in the mode of issuing treasury notes. And consequently, if there was implied power to declare those notes money and make them a legal tender for money due on private contract, it must be incident to the borrowing power, and to no other express power. And if those treasury notes be money, to issue "money to borrow money" would be a strange solecism. But we can scarcely see that such an enactment was, in the constitutional sense, a "necessary" mean to the end of borrowing, for it does not certainly appear to have essentially facilitated that object,
56 crippled as it was by the act which employed it as a mean; and it is quite evident that if, abstractly, it might have had some such effect, it was more than neutralized, even to the great depression of the notes by the provision in the same act which, instead of requiring duties on imports to be paid on those notes, exacted gold and silver. But however this may be, we cannot doubt that the expedient resorted to was not, in the constitutional sense, a "proper" mean. And this is already demonstrated, unless we are mistaken in the foregoing principles and illustrations of the Constitution bearing on the term "proper," or in the conclusion that the provisions, spirit, and history of the Constitution forbid anything but gold and silver as money, or as a tender on contracts for money. And if we are right, as we feel well assured we are, no one can pretend that the power assumed is or could be implied, because it is an axiomatic truth that nothing inconsistent with the Constitution can be implied as constitutional.

And had there been no other objection to the assumed implication in this case, the fact that to make money and fix the law of tender are great substantive powers, recognized and disposed of by the constitution, and therefore no power on that subject can be implied
57 beyond or different from that expressed.

The intrusion on State jurisdiction over private contracts furnishes another illustration equally apparent and conclusive.

To make treasury notes a legal tender in satisfaction of a contract for money deriving its obligation from State laws, unconstitutionally impairs the legal obligation of the contract.

The legal obligation of a contract arises from and is moulded by the civil remedy provided by law for upholding and enforcing it. The law obliges or coerces by some remedial process alone; and without legal remedy there can be no legal obligations.

But whenever there is such remedy there is such obligation. Man's ingenuity cannot show how legislation can destroy or impair the obligation of a contract otherwise than by operating on the remedy. Any legislative act that takes away all remedy destroys the obligation; and any such act as impairs the remedy, thereby impairs the obligation. Right and remedy are different things; and consequently no retroactive change in the remedy existing under the lex loci at the date of a con-

tract, would impair its obligation unless the substituted or modified remedy is less stringent, available, and effectual; but any change
58 that makes the remedy less efficacious, to that extent unquestionably impairs it.

The law under the sanction and faith of which a contract is made and to be performed defines its obligation. And therefore any legislative act that makes the right less valuable and available so far impairs the obligation of the contract. The contract in this case bound the debtor to pay the creditor a certain sum in money. The law of Kentucky, where the contract was made and to be performed, entitled the creditor to remedy to enforce the payment in money of the stipulated amount; and, of course, any legislation requiring him to take anything else or of less value would impair the legal obligation of his contract. Treasury notes are not money. Nor are $100 of such paper equivalent to the same in money. To the extent of the difference the two things are not commensurable in either kind or value, and to the same extent the creditor, if not permitted to recover his debt on money, or if compelled to take less than its value, is legislated out of it. The tender act of Congress, therefore, if enforced, impairs the obligation of the contract.

But the appellee insists that Congress had a constitutional right thus to impair, and in support of that assumption his counsel
59 argued that as the provision in the Constitution prohibiting all State legislation impairing the obligation of contracts does not apply to or restrain Congress, this pretermission implies a concession of that power to Congress. This presents an unsettled, difficult, and very important problem for judicial solution. On full consideration our conclusion is that Congress neither had, nor consistently or safely could have, any such power, except so far as it has been granted, in the express power to establish a uniform system of bankrupt laws.

For the harmony of the Union and the equality of commercial rights and intercourse between the people of the States it was thought that bankrupt laws should be the same in all the States; and as that unity could be secured only by one will, the States delegated to Congress power to establish a uniform system of bankrupt laws, and reserved each to herself all other power over private contracts.

A bankrupt law imports ex vi termini a release of a debtor on prescribed conditions without paying the debt, and therefore this grant gave Congress power, in that class of cases alone, to impair the obligation of contracts, and by necessary implication it could ex-
60 ercise no power over any other class of contracts; all of which, according to the federal theory, belong, and should belong, exclusively to the States, such private contracts being more local than national in character and interest. And, knowing that Congress could rightfully exercise no power over contracts beyond what they granted, and having granted a limited power, the people, however tenacious of their local power, did not find that it was either fitting or consistent to insert an express prohibition against the exercise by Congress of power not granted to impair the obligation of contracts. The

simple fact that they granted only a limited power implies that they intended that Congress should not exercise an unlimited power or one less restricted; and that implication is made unquestionable by the proceedings of the convention, and by the fact also that the motives which dictated the prohibition to the States applied to a great extent and in a controlling degree to Congress as well as to State legislatures. To concede to Congress power over the obligation of all private contracts made under State laws would change the theory of national and local power, alter the established and only safe or consistent test of power, and dangerously tend to too much cen-
61 tralism. This alone would be sufficient to repel all implication of power to make paper a lawful tender. We are therefore of the opinion that Congress has no constitutional power to impair the obligation of contracts beyond its express power over bankruptcy.

The case of Weston *vs.* The City of Charleston is, however, cited to show that as the express power to borrow money gave to Congress the incidental means to borrow on the best terms, any adaptable means may be chosen and maintained, even though it may intrude on State rights.

But the principle of that case is not applicable to this.

In that case the Supreme Court decided only that, though a State had a general right to tax all property within its local jurisdiction, yet it could not tax the Bank of the United States, because that institution had been constitutionally established by Congress, and there could be no antagonistic power in a State to destroy it, as might be done by indefinite taxation. But in this case the question is one of power in Congress to make treasury notes a tender, and in deciding whether there was implied power to make them a tender, its inconsistency with the Constitution, and its interference with rights
62 reserved by the States, and intentionally withheld from Congress, is not only admissible, but conclusive, to show that such a mean is not proper, and that therefore there could be no such implied power. The power to establish the bank has been adjudged as implied, and it never could have been decided to be constitutional had it been deemed inconsistent with the Constitution or with State rights, which would have negatived the implication. And that is the question in this case. Had the tender act, like the bank charter, been adjudged constitutional, and then had a State attempted to resist the tender because it interfered with its own power over contracts, the case cited would have been analagous in principle. But the two cases are in fact antipodal in principal, and the cited case does not touch the case in hand. Without further elaboration we are content with the conviction that the following conclusions are inevitable—

1st. The people in adopting their national Constitution, with signal emphasis and impressive forethought established gold and silver coin as the money and the only legal money of the United States.

2d. To secure their well considered object they determined that no legislation, State or national, should ever make anything else

63 a legal tender for money demandable on any contract made between citizens under the sanction of the State laws.

3d. That they experimentally understood the radical difference between constitutional money and a mere paper "currency," and intended that no such mere currency should ever supplant the use or shake the stability of gold and silver as the true standard of value for money and for property.

The necessary corollary is that all power not expressly delegated over money is constructively forbidden. And if this be true there can be no implied power to make treasury notes a legal tender in private contracts. And this ultimate conclusion is illustrated by the significant fact that for more than seventy years succeding the inauguration of the Union, Congress in no financial pressure or vicissitude of fortune ever, until February, 1862, attempted to make treasury notes or any other paper credit a tender for individual debt. To declare what shall be money and what a legal tender is a substantive power fully executed by the Constitution itself, and not left to ordinary legislation; and even otherwise, could not be implied as "necescessary and proper" means subservient to the end of the express powers.

64 For the foregoing reasons we not only see no plausible ground for the constitutional foundation of so much of the act of February, 1862, as declares United States treasury notes to be money and legal tender in payment of debts on private contract; but we think that it is destitute of any such support, and is clearly unconstitutional, and therefore should not be enforced as law.

Wherefore, a majority of the court—Judge Williams dissenting—adjudge that the chancellor erred in requiring the appellant to accept treasury notes in discharge of his contract for money.

In coming to this conclusion we have looked only to the clear and only safe horizon of power defined by the Constitution and illustrated by such jurists apd publicists as Hamilton and Madison and Marshall and Webster, all of whom were sufficiently latitudinarian. That line, consecrated by both authority and time, we have long regarded as the true boundary of constitutional liberty and Union. Beyond this there is no boundary line either defined or definable. To pass or observe it would change the equipoise of our correlative governments, and open a wide door to anarchy and despotism.

65 And such an adventurous experiment would be pregnant with peril to our institutions.

To avoid it and realize the hopes of our fathers, we must stand where they stood. Super antiguas vias.

We apprehend that the tender enactment passed the true conservative line, and we do fear that if that leap be finally sanctioned, the power of Congress may soon become practically unlimited and illimitable, except by discretion and policy; we can see no other limit; none other has been defined in this case.

Persuaded that we are right, no apprehension of inconvenient consequences merely fiscal, nor human responsibility could excuse the announcement of any opinion which is not conscientiously our own.

To guard the Constitution is the highest trust of the judiciary, and, thinking as we do, were we to bow to any other power than the law as we understand it, we should feel guilty of a criminal breach of trust and a shameful desertion of our post. Looking neither to the right nor to the left, we must know nothing but the law, and shall quietly pursue its straight and luminous pathway, just as our own eyes see it; and we feel assured that whatever popular apprehension might be hastily awakened by an authoritative affirmance of
66 our decision, it would soon be found to have been chimerical, and would be more than compensated by the assured fact that the Constitution, thus rescued from a labyrinth of arbitrary construction, without any certain and assuring clue, would be hallowed by restored confidence and by revived hopes of its longevity and beneficence. Public necessity is an arbitrary and unsafe dictator; and to save, while savable from its lawless dominion, an upright judiciary should now, if ever, self-sacrificingly if need be, illustrate the righteous maxim of Christian patriotism, "Fiat justicia ruat cœlum."

Wherefore the judgment of the chancellor is reversed, and the cause remanded, with instructions to render in appellant's favor a judgment conformable with the principles of this opinion.

The dissenting opinion of Judge R. K. Williams is in the words and figures as follows, to wit:

NOTE BY THE CLERK.—We here insert a printed copy of said opinion.

67 *Dissenting opinion of Judge R. K. Williams, of the appellate court of Kentucky.*

GRISWOLD *vs.* HEPBURN *et al.* } June term, 1865.

Congress, by an act approved February 25th, 1862, authorized the issual of treasury notes of the United States, and enacted that they should be a legal tender in the payment of all private and certain public debts. The sole question in this case is as to the constitutionality of said act.

Has the United States Constitution declared what shall be a legal tender seems to be naturally the first question to solve; for if so, no act of Congress could alter it, and it would not be an open question for judicial investigation and determination.

Previous to the formation of the national Constitution the colonies and then the States, in the exercise of sovereign power, had frequently, each for itself, within its own jurisdiction and for its own citizens, declared what should be a legal tender, not always restricting this to either metallic or paper money, but sometimes declaring tobacco and other commodities a legal tender.

By section 4, article 9, of the Articles of Confederation, it was provided "that the United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States."

In the formation of a national, sovereign, supreme government, it was deemed proper that the States should surrender all
68 their sovereign power over this vast and important subject, save alone the right to declare gold and silver coin a legal tender, which might be made, and the value regulated by Congress; or if foreign coin, its value so regulated. Hence by paragraph 1, section 10, article 1, United States Constitution, it is provided—

"That no State shall coin money, or make anything but gold and silver coin a tender in the payment of debts." And by clause 5, section 8, same article, Congress is given the power "to coin money, regulate the value thereof, and of foreign coin."

But nowhere does the Constitution declare what shall be a legal tender; on the contrary, the language of the Constitution, the history of the convention, the legislative history of the government under the Constitution, all conspire to the inevitable conclusion that it was not intended to fix the legal tender in the Constitution, but to leave it among the numerous subjects of legislation.

"No State shall make anything but gold and silver coin a tender in the payment of debts," leaves the unquestionable right and power in the States to make such coins a legal tender, and how can they so make them but by enactment? If the Constitution has provided that such coin shall be a legal tender, why leave the power still with the States to enact what the Constitution had already ordained? This would be a folly not justly imputable to a body of such wise and patriotic men as framed the Constitution.

Had the Constitution declared what should be a legal tender, this would have necessarily withdrawn it from the subjects of legislation. The power to coin money and regulate its value is not restricted to gold and silver, even if, as contended by some, it only authorizes the coinage of metals.

Congress has already coined copper and nickel, and should it deem the coinage of brass or zinc, or other metals, politic, it is not perceived by what clause of the Constitution the general and unlimited power to coin money is to be restricted so as not to authorize this; and if all these coins of cheap and base metal become lawful money, and a legal tender by virtue of constitutional provision, Congress has placed it in the power of perverse debtors most effectually to destroy their creditors' debt by paying large amounts of these almost valueless coins, notwithstanding Congress has declared that these should not be a legal tender.

But to escape the unfortunate consequences of this logical corollary, it is asserted that the clause prohibiting the States from making anything but gold and silver coin a legal tender, restricts
69 the grant to Congress "to coin money," and limits this general power, given in general terms, to the specific power to coin gold and silver. It is believed that in all the history of our jurisprudence no rule of construction can be found which applies a prohibition on State legislation as a restriction on an express power granted in general terms to Congress.

Such a rule of construction is deemed new, illegal, illogical, and totally unsupported by judicial authority.

Neither can the logic of facts and figures, and the import of general but plain terms, be met by the most beautiful similitudes, elegant amplitudes, dazzling drapery of sophistry, nor rhetorical sentences.

Had the convention intended that Congress should coin gold and silver alone, it would have said so, as it did say the States should make nothing but gold and silver coin a legal tender. To coin money and regulate its value is a very large and general power. To make gold and silver coin alone a legal tender is very restricted and specific power. It is utterly impossible that the convention could have used these terms as synonymous. They are not so, nor did the convention so use them.

Nor did the convention intend to perpetrate the folly and absurdity of making every coin which convenience and policy might dictate that Congress should authorize, a legal tender; but having wisely invested Congress with the unlimited power to coin money, intended, also, to leave with them the right to declare what should and what should not be a legal tender; subject alone to the qualification that the States might enact that the gold and silver coins authorized and value regulated by Congress should be a legal tender.

August 6th, 1787, the committee of detail presented the Constitution as it had been previously agreed upon in convention. The thirteenth article provided that "no State, without the consent of the legislature of the United States, should make anything but specie a tender in the payment of debts." If the convention had understood that nothing but gold and silver were to be a legal tender, surely they would not have proposed to leave with the States the power to make something else such by the consent of Congress; besides, this is a clear indication that the convention understood that the subject of legal tender was to be controlled by Congress.

This view is strongly fortified by the discussion on clause 2, section 8, article 1, which, as originally reported, gave to Congress
70 the power "to borrow money and emit bills on the credit of the United States."

Governeur Morris moved to strike out the words "and emit bills on the credit of the United States," remarking that it would be unnecessary if the United States had credit; useless and unjust if they had not.

Mr. Madison inquired: "Will it not be sufficient to prohibit the making them a tender? This, said he, will remove the temptation to emit them with unjust views. And promissory notes, in that shape, may, in some emergencies, be best.

Mr. Morris replied, that striking out the words will leave room still for notes of a responsible minister, which will do all the good without the mischief.

Mr. Gorham was for striking out without inserting any prohibition. Said he, the power, as far as it will be safe or necessary, is involved in that of borrowing money.

Mr. Mercer was a friend to paper money, and was consequently

opposed to a prohibition altogether. He said, "It would stamp suspicion on the government to deny it a discretion on this point.

The clause was stricken out, but no prohibition inserted.

See Madison papers, 3 vol., page 1343, and subsequent pages.

It is remarkable that in this discussion Mr. Madison stood alone for prohibiting Congress from making these treasury notes, or bills of credit, a legal tender. All conceded that the power to issue such was included in that of borrowing money, and neither Mr. Madison nor any other single one suggested that the Constitution had or would fix gold and silver as the legal tender, nor that to make such bills of credit a legal tender would conflict with any other clause of the Constitution.

And although the 13th article, as reported, was altered by striking out the words "without the consent of the legislature of the United States," and the words "gold and silver coin" were inserted in the stead of "specie," leaving the Constitution in its present language, that "no State shall make anything but gold and silver coin a tender in the payment of debts," yet this in nowise indicates that it was intended to restrict the powers of Congress, but rather the contrary; nor can this language be rationally construed as restrictive of any of the express grants or necessarily implied powers, from such grants of the Constitution.

Having conferred upon Congress the power to coin money, and regulate its value, and of foreign coin, it was deemed entirely safe
71 to leave with the several States so much of their original sovereign power, on this subject, as to declare such coin a legal tender; but it was regarded as essential they should surrender all other power over this entire subject. This, and nothing more, was intended by this language.

The convention well knew that this subject of legal tender had been a fruitful source of discordant legislation by the several States. In the making a supreme, sovereign, perpetual, national government, what could have been more appropriate and necessary than to give it supreme control over the national currency by which uniformity of kind and value might be produced among the several States? And although the power to declare gold and silver coin a legal tender was still left with the States, and they could so enact in the absence and perhaps in defiance of any act of Congress, yet this power must be exercised in subordination to the power of Congress to coin the money, and regulate its value, and of foreign coin

In pursuance of this seeming understanding and intent of the convention, and meaning of the Constitution, Congress, from its earliest existence, has claimed the right to legislate on this subject.

By an act of April 2, 1792, establishing "the mint for striking and coining gold and silver coins," Congress, after prescribing the weight, quality, and value of the coins to be struck, declared "that all the coins which shall be issued from said mint shall be a lawful tender in all payments whatsoever."

By an act of February 9, 1793, Congress provided that after the first of the following July, that "the gold and silver coins of England

and Portugal, France and Spain, should pass current as money within the United States, and be a legal tender for the payment of all debts." This act repealed the act of August 4, 1790, which, among other things, prescribed that certain foreign coins therein enumerated should be received for duties at prescribed rates, but did not make them a legal tender for any other purpose.

Congress had, from time to time, enacted other laws changing the value of certain foreign coins, and making them a legal tender, sometimes for limited and specified purposes, then, again, for all purposes; now by weight, then by tale. Such were the several acts of April 10, 1806, and March 3, 1823, making them receivable for public lands, and the acts of June 25, 1834, and March 3, 1834, declaring the legal value of certain silver coins, and that they should pass as
72 money within the United States by tale for the payment of all debts.

By an act of June 28, 1834, it was directed that foreign gold coins should pass current as money within the United States, and be received in all payments, weight according to the fineness and rates therein specified.

By an act of January 28, 1837, it was provided that the standard for both gold and silver coins should thereafter be of one thousand parts by weight, nine hundred should be of pure metal, and one hundred of alloy, and that the alloy of silver coins should be of copper, and the alloy of gold coins should be of copper and silver; but that not over one-half of such alloy should be silver, and the weight and value of each were prescribed and declared to be a legal tender according to their nominal value, and that the gold and silver coin previously issued should continue to be a legal tender at their nominal value as though of the coinage of said act.

By an act of February 27th, 1853, the weight of the silver half dollar was reduced from $206\frac{1}{4}$ to 192 grains, and the lesser silver coins proportionately, and these were made legal tender only in payment of debts for all sums not exceeding five dollars.

Thus it is seen that Congress has claimed and exercised unlimited power over the legal tender, declaring what coins shall be received in payment of debts, and withholding the legal tender quality from others, though coined and the value regulated by its own authority, sometimes impressing them with the legal tender quality for specified purposes and to limited amounts; at others, declaring them a tender for all purposes and amounts.

This assertion of power by Congress, and the seeming acquiescence, without challenge, by all the departments of the government, the profession, and people, from the earliest history of the Constitution down to this enactment of February 25th, 1862, is a strong proof of its existence; and this rule of construction has been so often recognized by the Supreme Court of the United States and the several States, as hardly to need a recital of authority; still, see Martin *vs.* Hunter, 1 Wheaton, 421; Cohens *vs.* Virginia, 6 Wheaton, 421; Briscoe *vs.* Bank of Kentucky, 11 Peters, 257; Moores *vs.* City of Read-

ing, 21 Penn., 188; Norris *vs.* Clymer, 2 Penn., 277; People *vs.* Green, 2 Wend., 274; People *vs.* Constant, 11 Wend., 511.

Another rule of construction has been followed ever since the leading and exhaustive opinion of the Supreme Court of the
73 United States in McCulloch *vs.* Maryland, 4 Wheaton, 316, by Chief Justice Marshall. Said the court: "Let the end be legitimate—let it be within the scope of the Constitution—and all means which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional." * * * * "When the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative grounds."

If this power to enact paper money to be a legal tender is not prohibited, but is an appropriate mean of executing any of the powers granted by the Constitution, it is not a reserved power to the States or the people thereof, and does not come within the prohibitions of the tenth amendment to the Constitution, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

But it is urged that under the Articles of Confederation Congress did not presume to enact that paper money, or the bills of credit authorized to be issued by said articles, should be a legal tender, and this is true; but it is also true whilst they did not, because they could not, enact these to be a legal tender, they did recommend to the States to enact such bills to be a legal tender, which the States, at the instance of Congress, did do, and this, too, notwithstanding to Congress was given the express, sole, and exclusive power of regulating the value of the coin struck by its own authority and that of the respective States. Hence no force is perceived in such argument. Nor is the expression of a fugitive opinion by way of incidental argument on a pending bill, in no way involving the question of legal tender, by even Mr. Webster, deemed entitled to much consideration.

The Constitution has not, then, declared what shall be a legal tender, not even that gold and silver coin shall so be, nor has it conferred, in direct terms, the power on Congress to so declare. It has, however, left it as a subject of legislation; and this power to declare anything a legal tender whenever and wherever found, will be ascertained among the incidental powers, but still as much sovereign as if expressly granted. Is there any inhibition upon the power of Congress to declare paper money a legal tender anywhere to be found in the Constitution? seems to be the next natural and logical question.

74 The States are prohibited from coining money, making anything but gold and silver coin a legal tender, and enacting any law impairing the obligation of contracts, but no such prohibitions are imposed upon Congress; and it is a most significant fact

that, whilst several other prohibitions are imposed upon the States, Congress is only prohibited from three things, to wit: passing bills of attainder, ex post facto laws, and granting titles of nobility; and as these inhibitions as to Congress are found in the next preceding section to those imposed upon the States, together with the historical facts mentioned, render it impossible to conceive that this most important subject of legal tender could have escaped the attention of the convention.

Had any inhibition been intended, but left out by casuality, it would have been found among the amendments to the Constitution, most of which were adopted at the suggestion of the several States made at the time of their ratification, and when the utmost vigilance and jealousy had been excited by the earnest opposition to its adoption made by the State's rights party, and some of which amendments have been adopted since Congress has asserted its right over the subject by legislating thereon.

The Constitution was silent as to what should constitute a legal tender; the States might not declare even gold and silver coin to be such; it was a subject of vast importance; a common and general government was being made, which was intended to be national and supreme over the American people and their States, invested also with sovereignty and perpetuity, and to it was intended to be given the necessary powers to protect this sovereignty, supremacy, and perpetuity, and to enable it to accomplish the great objects of its creation, in conducting their foreign relations and controlling their national affairs.

Among the powers conferred to accomplish these great objects were the regulation of commerce among the States, to coin money and regulate its value, and of foreign coin, to borrow money, to raise and support an army, provide and maintain a navy, and to call out the militia to repel invasion and suppress insurrection. To inhibit Congress from declaring the legal tender, or enacting that anything but gold and silver should be such, might seriously impair the efficiency of these great powers intended to be conferred without limit, and produce serious and calamitous embarrassment in times of great national peril.

The national debt was then large, and must be provided for; so scrupulous were our fathers on this subject that they provided
75 by clause 1, article 6 of the Constitution that "all debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the confederation."

Had the Constitution fixed gold and silver as the legal tender, or had inhibited Congress from making anything else such, the principal and interest of the national debt would have to be discharged in such coins, which was then literally impossible, as the entire gold and silver circulation of the American people was little more than adequate to one year's interest on the national debt.

The total amount of specie received by the United States Treasury for the years 1778 and 1779, whilst engaged in the revolutionary

struggle and when much needed, and the authorities exerting every energy to get it, amounted to only $151,666.

After the adoption of the national Constitution, we learn from the reports of Mr. Hamilton, the first Secretary of the Treasury, that the national debt amounted to $94,000,000, bearing an annual interest of more than $5,000,000, when high authority has fixed the entire gold and silver circulation of the people at this time at not exceeding this latter sum.

The scarcity of the precious metals at this period may be somewhat appreciated from the official returns of the operation of the mint established by the act of 1792. From 1793 to 1800, inclusive, a period of eight years, the entire coinage of the government was, of gold $1,014,290; silver, $1,440,455—total, $2,454,745, or an annual average of something over three hundred thousand dollars. History has well attested that the great financial embarrassments of the United States government, under the Articles of Confederation of the several States and the people at large, were among the prominent causes which led to the formation of the national Constitution.

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States or in any department or officer thereof.

As was said by Chief Justice Denio, of the appellate court of New York, in his dissenting opinion adverse to the constitutionality
77 of said act of Congress of February 26th, 1862, in the case of Meyer *vs.* Roosevelt, September term, 1863, 13 Smith's N. Y. R.: "It is not incumbent upon those who argue for the validity of the legal-tender clause to select any one express power. They may group together any number of these grants of legislative authority, and if the right to enact that provision is fairly deducible from any or all of them, their position is established."

It is almost past comprehension that a body of such wise and patriotic men as the American people have been taught to regard the convention, and which have been unanimously accorded them by posterity, could have added to those embarrassments by the adoption of such a provision in the Constitution as was then literally impossible for the government or people, or both combined, to comply with. The total gold and silver of the country being inadequate to the payment of the annual interest on the public debt, would have left the people without a constitutional currency to discharge their private obligations. Such a state of affairs must have resulted ex-
76 tremely disastrous to both the government and people, and is a pregnant fact conducive to the belief that the convention did not intend to fix the legal tender in the Constitution, nor to inhibit Congress from the largest jurisdiction over the subject. The situation of the government, the people, and the currency rendered it impossible for the convention, with any degree of certainty or safety, to fix what should be a constitutional currency alone; but stern, unrelenting necessity demanded that they should leave it a subject of legislation, trusting to the patriotism and wisdom of the

people and their Congress, and the then unseen developments of the future to carry them safely through those difficult embarrassments.

The unseen but almost magic increase of the precious metals and wealth of the people, the progress in the powers of the nation, and the many perils by which the government has been environed, the most imminent of which it has just safely emerged from, as the flattering indications assure us, all attest the great wisdom of the Constitution in leaving this subject of legal tender unrestricted with the law-enacting department of the government.

As the Constitution has not ordained what shall be a legal tender, nor has it prohibited Congress from so ordaining, we come to the question whether this power has been conferred upon Congress as a necessary and proper means of executing other powers expressly granted. Among the express powers conferred upon Congress by section 8, article 1, United States Constitution are:

To pay the debts, and provide for the common defense and general welfare of the United States.

To regulate commerce among the several States and with the Indian tribes.

To coin money, regulate the value thereof, and of foreign coin.

To declare war.

To raise and support an army.

To provide and maintain a navy.

To provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and quell invasion.

If the power to declare what may be a legal tender does exist, though belonging to that class known as implied powers, it is a sovereign power, and Congress has as much right to enact laws for carrying it into execution as though granted in direct terms.

If this be a proper and necessary mean of executing any one or more of the express powers, it is not only an implied power, incidental to such express power, but, by virtue of clause 18, section 8, article 1, of the United States Constitution, Congress "may make all laws which shall be necessary and proper for carrying it into execution," or, in other words, may make all necessary and proper laws to execute all the express and implied powers found in the Constitution.

For an elaborate discussion of these sovereign powers, see Norris *vs.* Doniphon, 4 Met. Ky. R., 386, and Judge Williams's separate opinion, 403. I also quote from the very able opinion of the appellate court of New York, by Judge Daviess, in the case of Meyer *vs.* Roosevelt, before recited, sustaining the legal-tender clause:

"Every form of government unavoidably includes a grant of some discretionary powers. It would be wholly imbecile without them. It is impossible to foresee all the exigencies which may arise in the progress of events, connected with the rights, duties, and operations of the government. If they could be foreseen, it would be impossible ab initio to provide for them. The means must be subject to perpetual modification and change; they must be adapted to the ex-

isting manners, habits, and institutions of society, which are never stationary; to the pressure of dangers or necessities; to the ends in view; to general and permanent operations, as well as to fugitive and extraordinary emergencies. In short, if the whole society is not revolutionized in every critical period, and remodeled in every generation, there must be left to those who administer the government a large mass of discretionary powers capable of greater or actual expansion, according to circumstances, and sufficiently flexible not to involve the nation in either destruction from the
78 rigid limitations imposed upon it by an improvident jealousy. Every power, however limited, as well as broad, is in its own nature susceptible of abuse. No constitution can provide perfect guards against it. Confidence must be reposed somewhere, and in free governments the ordinary securities against abuse are found in the responsibility of rulers to the people, and in the just exercise of the elective franchise, and ultimately in the sovereign power of change belonging to them, in cases requiring extraordinary remedies."

In Anderson *vs.* Duncan, 6 Wheaton, page 204, the court said:

"The idea is utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest upon responsibility and stated appeals to public approbation. Where all power is derived from the people, and public functionaries at short intervals deposit it at the feet of the people, to be resumed again only at their own wills, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger."

The power to declare the legal tender is not substantive, but incidental to several substantive powers; to coin money and regulate its value is substantive, and to declare such coin a legal tender, incidental thereto; to borrow money is substantive, and to use such means as may be necessary to execute it are incidental; to declare war is substantive, to make a blockade and other things may be incidental thereto; to raise and support an army, provide and maintain a navy, are substantive, to arm, equip, and transport the same are incidental.

But for the use of gold and silver as a circulating medium by the civilized nations, these would have but comparatively little intrinsic value; they are not intrinsically money; they may be better adapted to that use than other commodities, but who can tell in the progress of science and chemical, geological, and mineralogical developments, that some other metal as well or better adapted to such use may not be discovered?

The earl of Liverpool, in his Treatise on the Coins of the Realm, p. 8, London, 1805, said: "Money is a standard measure by which the value of all things are regulated and ascertained, and is itself, at the same time, the value or equivalent for which goods are delivered." Eckfield & Dubois, in their Manual of Coins and Bullion, and supplement thereto, down to 1851, chapter 24, No. 642, L. Congressional Library, page 6, which is an official report to Congress on our coins,

says: "This is a standard definition given by all the authorities from Aristotle down to the present time."

79 "The commodity which has thus, by the uniform but silent, unconcerted operation of human motives and action, become the common medium of exchange and general measure of value, constitutes the money of the community, and in this character it acquires an additional value."

"Various articles in different countries and in different stages of society, have, in this way, acquired the property of money. * * * * Tobacco was also used as a universal equivalent in Maryland and Virginia." (Tucker on Money and Banking, pp. 4 and 5.)

In Virginia and this State are to be found statutes giving so many pounds of tobacco as costs by the judgment of court, which were, after many years had elapsed, changed by enacting so that each pound of tobacco should be regarded as of given value, and the costs should be collected in money at such rates. Gold and silver being coined, and the value regulated, and declared to be a legal tender by authority of Congress, became indeed "precious metals."

By impressing this legal tender quality on the government's own promises to pay, they, too, become of "precious value." In what consists the difference of constitutional power in the impressing with a new and valuable, but not intrinsic, quality metals or paper? The greater value of neither is intrinsic, but derived from the omnipotent fiat of Congress in ordaining them to be a legal tender, and making them the legal standard by which the value of all commodities, the discharge of all private liabilities, and the commerce of the country shall be regulated, and by infusing into these inanimate and almost valueless things the vitality of a circulating medium, vesting them with a magic and almost incalculable value.

If the making these treasury notes a legal tender does invest them with this new, inestimable, and magic value, who can say it is not a necessary and proper mean of borrowing money? The power of the government to issue its securities for what it may need, as compensation for either services or commodities, has been so often exercised, so universally acquiesced in, and for so long a period, and sustained in every instance in which the question in any of its phases has come before the courts, as no longer to be considered an open question for further controversy; and having this unquestioned right, it may issue just such securities as Congress may direct, either as interest-bearing coupon bonds designed for permanent investments or

80 stocks, or treasury notes designed for circulation as a medium.

The latter class obtained so early as Mr. Madison's administration, and has been often issued since, with the concurrence of our ablest statesmen and jurists, even embracing those of the most rigid construction and extremest State's rights school. Even Mr. Calhoun, in the United States Senate, January 16th, 1840, said: "Paper has, to a certain extent, a decided advantage over gold and silver. It is preferable in large and distant transactions, and cannot, in a country like ours, be dispensed with in the fiscal transactions of the govern-

ment, without much unnecessary expense and inconvenience, the truth of which would soon be manifest if the government should consent sent to dispense with the use of treasury drafts. But this is not the only form in which it may be necessary or convenient for it to use its own credit. * * * I am decidedly opposed to government loans. I believe them to be, in reality, little better than a fraud on the community, if made in bank notes, and highly injurious if made in large amounts in specie. * * * It may be laid down as a maxim, that without banks and bank notes, large government loans are impracticable, and without some substitute such loans, in the event of a war, will be unavoidable. The only substitute will be found to be in the direct use by the government of its own credit. * * * I also regard the use by the government of its own credit in the form of treasury notes, or some other better form, as indispensable to the permanent success of the policy of this bill." (Sub-treasury bill.)

On a bill authorizing the issual of treasury notes, he, on September 19, 1837, said: "Believing that there might be a sound and safe paper currency founded on the credit of the government exclusively, I was desirous that those who were responsible, and have the power, should have availed themselves of the opportunity of the temporary deficit in the treasury."

In a rebellion of such gigantic proportions and vast magnitude, requiring an army of a million of soldiers and sailors to suppress it, involving the government in a daily outlay of say two millions of dollars, or of an annual expenditure of say seven hundred and thirty millions of dollars, could this vast army have been "raised and supported," and this immense navy "provided and maintained" on the circulating medium of the loyal States, including the specie and paper currency and that which belonged to individuals and corporations? The precise amount cannot be ascertained; but we have sufficiently accurate data to direct with almost absolute certainty to a cor-
81 rect determination. By reference to United States Banker's Magazine, vol. 12, p. 341–'2, it will be ascertained that the specie in the banks of the loyal States, at the breaking out of the war, amounted to $76,314,712, and the circulation of said banks to $139,577,439; total, $215,892,151; thus the entire capacity of all the banks of the loyal States was something less than adequate to one hundred and twenty days' expenditure. But it would have been wholly impracticable, yea impossible, for the banks to have collected from their customers this circulating medium, and any attempt to do so would but have intensified the financial panic of the first few months of the war, and produced general bankruptcy upon the people and disaster to the government.

What the amount of specie in individual hands was cannot be ascertained with any satisfactory degree of certainty, nor is it important to do so, for whether large or small, it was soon hoarded and secreted, and of but little more use to the government than if it had not existed.

The dangers attendant upon war, even with foreign nations, have

always caused the hoarding and secreting of the precious metals. No government, however energetic and despotic, can prevent this; private cupidity, stimulated by alarm, has ever been and will ever prove too active, sagacious, and efficient for the strongest and most vigilant government.

This cupidity, sagacity, and energy are greatly enhanced by the perils of a civil commotion endangering the existence of the government, unsettling private rights, making uncertain private property and jeopardizing personal liberty; whilst in a government mild and liberal, and beneficent in its provisions and action, scarcely any restraint is found over this controlling passion of the human heart to provide against these perils and calamities. The inevitable consequence of this rebellion, as in all past times, was to create alarm and distrust; each man became a vigilant guard for his own interest and that of his family; the creditor desired to realize his debt, and that, too, in specie, so far as at all practicable. The holders of bank notes desired them redeemed in gold. In this active state of alarm and vigilant caring for private interest, the banks were soon driven to a suspension of specie payments, the gold and silver coins sought the places of safety, secrecy, and darkness. No longer did these perform the functions of a "circulating medium," and he that sought for these could most truthfully return "non est inventus."

82 A financial and commercial panic seized upon the country. The treasury of the government was empty, its necessities numerous and most pressing; it wanted to borrow large sums, but where were the lenders? The banks might be depended on to supply the first needs, but these would soon become exhausted, because so greatly inadequate.

If the government would preserve its own national existence it must "raise and support" immense armies, "provide and maintain" vast navies. To do this required more money annually than the entire circulation of the banks and the gold and silver coins of the banks and the peole of the loyal States.

With a strong not to say, unfriendly, disposition on the part of the governments and people of the two leading maritime, manufacturing, commercial, and wealthy nations of Europe, to exaggerate the dangers and weakness of the government, and magnify the strength and certainty of success of the rebellion, hopes of a foreign loan could not be reasonably entertained.

Besides, the government must encounter all the moral influence and financial power of the disloyal at home, who, not content with abstracting the gold and silver coins from the use of the government, but were constantly, with an energetic vigilance, decrying the government credit and securities, using their financial talents to create and spread distrust and alarm, and their financial and money power to sink the government credit to the lowest grade.

In this transition state from peace to war, revolution in the habits of our people and the commerce of the country, surrounded by disloyalty, distrust, and alarm, the government must provide for these new exigencies, unforeseen, consequently unprovided for, but still

imperious in their necessities, else its armies could not be "raised and supported," its navies could not be "provided and maintained," and without these it could not perpetuate its national existence, but must vanish from the world as a thing of the past, and with its downfall must go the last, brightest evidence of man's capability for self-government. If, then, to issue its own "promises to pay," in convenient form and amounts for circulation, and to impress these with a new and magic quality and value, and thereby provide for this overruling necessity, and at once place the government in possession of the necessary means to "raise and support" its army and "provide and maintain" its navy, how shall it be said this was not a necessary and proper law for executing these powers?

83 And if it was a proper and necessary mean of executing any of the enumerated powers, it was not only incidental to such powers, but expressly authorized by clause 18, section 8, article 1, of the Constitution.

But it is said that had Congress increased the taxes, and pledged the public revenue and lands, or had it made treasury notes interest bearing, it would have much more sustained the credit of the government and these notes, than to make them a legal tender.

Now, it so happened that at the very session that enacted this legal tender immense taxes were laid, the revenue pledged, two years' five per cent. semi-annual coupon legal tender treasury notes were also authorized and issued, and, notwithstanding the legal tender quality was imparted, with all the other props suggested, the credit of these treasury notes, of all classes, continued to sink, until they would not command in market forty per cent. of their par value in gold and silver, and it is but another evidence of the impracticability and unreliability and very insignificant value of speculative theories.

It is again said the five-twenty bonds were more valuable than these treasury notes. The history of the gambling markets of New York would show they varied from a few cents below to a few cents above their par value, in these treasury notes, perhaps a larger part of the time above par; but when it is remembered that these bonds were to be paid at maturity in gold, and the interest was to be paid semi-annually in gold, this fact affords neither argument nor inference.

If this power does exist, its existence is contemporaneous with the Constitution, although the occasion for its exercise may not have occurred until long since.

There are powers which were conferred by, and exist contemporaneous with, the Constitution which were not intended nor expected o be exercised in times of peace.

Then whether the power to make these treasury notes a legal tender be alone included in the power to coin money and regulate its value, and of foreign coins, or to borrow money, or to regulate commerce among the States, or to raise and support an army, and to provide and maintain a navy, or to provide for calling forth the militia to suppress insurrection and enforce the laws of the Union, or whether it is a proper and necessary mean of executing any one or

more of these powers, it is equally authorized by the Constitution, and obligatory as law.

84 These express, sovereign, and unlimited powers were conferred upon the national government for the transcendent purpose of perpetuating its existence, and thereby securing the liberty and nationality of the American people to the latest generation; and then, lest there should be some infirmity in the language conferring the powers, clause 18, section 8, article 1, gave to Congress in the broadest language the most plenary power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or any department or officer thereof."

As it was intended by this clause to perfect all the vested powers in their fullest significance and amplitude, Congress must, to a great extent, be left to judge what laws should be necessary and proper for the execution of the vested powers, and in a government deriving its powers from the people, being made to promote their general welfare, and to secure the blessings of liberty to them and their posterity, its laws designed to be the embodiment of public sentiment, subject to be changed and modified by this potent agency, as is also the Constitution itself, where could discretion be more safely or properly lodged than in the representatives of the people and their States? And before courts will unsettle the decrees of this, a coordinate department with their own, vested with the high powers of enactment, presumed to represent and respond to that public sentiment which was designed to be uncontrolled, and omnipotent within the sphere and allowances of the Constitution, they must be satisfied fully and clearly that the enactment is without the authority of the Constitution, and every rational presumption in favor of its validity is to be indulged.

Having shown, as is trusted, with reasonable certainty, that the Constitution does not declare what shall be a legal tender, nor has it restricted the legal tender to any kind of metals, coins, or money, and the power to declare these treasury notes a legal tender is not a substantive but derivative power, and was a necessary and proper execution of several vested powers, it remains to vindicate the justice and legality of making them such in the discharge of pre-existing debts, and that neither law, Constitution, nor good conscience demand that any more than the nominal amount should be required in the discharge of such debts.

This power to declare what shall be a legal tender existed from the adoption of the Constitution, to be exercised in such man-

85 ner and under such modifications as circumstances might require and the exigencies of the government might demand, and the general welfare of the people might indicate, and its exercise being of mutual hazard to the creditor and debtor, and whether the one or the other class might be the more seriously affected, would be equally just, as its exercise must be presumed to be for the "greatest good to the greatest number," and not to foster or inflict

private interest; hence, individual interest should yield to the public welfare and necessity.

It has been already remarked that whilst the States were prohibited from enacting laws impairing the obligation of contracts, none was imposed on Congress, but, on the contrary, Congress is authorized to "establish uniform laws on the subject of bankruptcies throughout the United States." Clause 4, sec. 8, art. 1, Constitution. It is true that this language does not in terms apply to pre-existing debts, yet the courts have unanimously upheld the constitutionality of bankrupt laws, by which the debtors in pre-existing liabilities have been released on their own voluntary application, and such laws have been adjudicated to be constitutional by that august and supreme tribunal, which the people and States have selected as the final arbiter in all questions of "law and equity arising under this Constitution and the laws of the United States," &c., to wit, the Supreme Court of the United States.

These bankrupt laws have been sustained when applying to pre-existing debts, on this principle: that this was a sovereign power vested by the Constitution in Congress, and liable to be exercised by them at any time; hence that each contract was made with the legal implication that the obligation should exist until discharged by the obligor, unless Congress should, in the mean time, provide for the obligor's release by a bankrupt law. Precisely so as to legal tender—his power to declare the legal tender is sovereign, though belonging o the class of implied powers. When Congress enacted that gold and silver coins should be a legal tender, every contract to pay dollars was a contract to pay that many dollars of the gold and silver coins so declared to be a legal tender, with the further legal implication that if Congress, in the mean time, should enact that something else should be a legal tender, that the debtor might discharge, and the creditor would receive, in this new legal-tender money or currency, the exact amount of dollars named in the obligation; and this implied condition is as much a part of the legal contract as its express conditions.

86 Congress has in various ways affected the obligation of contracts, sometimes in favor of the creditor, then in favor of the debtor. Such has been the effect of making gold and silver coins a legal tender when, previously, continental and other paper money and commodities had been a legal tender. War has always seriously affected contracts and often annihilated the rights of the creditor. Embargoes and blockades have had a similar effect, and the bankrupt laws annihilated the obligatory force of the contract; yet all these have been upheld by the highest judicial authority.

The gold coins by the act 1834 had been so debased that ninety-four eagles of the previous coinage contained as much gold as one hundred under this act, yet it took as many of the old eagles to discharge a debt as of the new eagles, although the old had a greater market value than the new, yet these were of equal value in the eyes of the law, because both were a legal tender, so declared by Congress,

for their nominal value or amount, and not for their marketable value.

This change of the legal tender is no new principle either in English or American legislation. In Poug *vs.* De Lindsay *et al.* (1 Dyer, 82 A.,) in debt on bond for payment of £24 sterling, plea of tender, that at the time of payment of said sum of money, certain money was current in England in the place of sterlings, called pollards, held, that if, at the time appointed for payment. a base money is current in lieu of sterling, tender at the time and place of that base money is good, and the creditor can recover no other.

Where the obligation was to pay on a given day five quarters of wheat, which were worth fifty pounds on the day of the contract, but only five pounds on the day of payment, the judgment was for the five quarters of wheat or *five* pounds, is recited from the year books II, H. VII, 36.

Queen Elizabeth by proclamation of May 24th, in the 43d year of her reign, declared and established as lawful and current money of Ireland a certain *mixed money*, which she had caused to be coined in the tower of London, to pay the royal army, and carry on the war in the rebellion of Tyrone.

Brett, a merchant of Drougheda, bought goods of Gilbert in London, and became bound to him for £100—previous to said proclamation. Brett made a tender of the £100 in this mixed money—this was held a good tender. Daviess R., 28. In Barrington *vs.* Potter, Dyer, 816, fol. 67. After the fall and debasement of money
87 in 5 Edw. VI., debt was brought on lease for two years' rent in arrears, which fell due at Mich. term, 2 Edw. VI. The lease was dated November 21; 31 year Henry VIII. At the time the rent fell due the shillings were current at 12 pence, which were decried to 6 pence at the time of bringing the action. The defendant pleaded tender on days of payment in *peciis monetæ Anglicæ vocat* shillings, and averred that each shilling was payable at 12 pence when tendered; the plaintiff received the money after demurring. "If foreign coin be made current at a higher rate than its intrinsic value by proclamation, a tender in such money is good in Great Britain." Bacon's ab. tender, b. 2, vol. 7, p. 325. The same principles have been upheld by the American courts. In Faw *vs.* Martellar, 2 Cranch, 20. In the year 1779, when Virginia currency consisted of paper money, Faw obligated himself to pay as yearly rent twenty-six pounds *Virginia currency*, but paper currency, which was lawful money at that date, had been withdrawn by a law of 1781; the defendant insisted he could only be compelled to pay in 1782 what this Virginia currency was worth at the time of the contract; that he had not contracted to pay specie, which was the legal currency at the time of the judgment; but the court, by Chief Justice Marshall, held: "This can only mean money current at the time the rents shall become payable. * * * The position that the *value of the money at the time* when the consideration for which it was to be paid was received is the standard by which the contract is to be measured, is not a correct one."

The case of Dowmans *vs.* Dowman's Exr., 1 Wash. Virg. R., 26, was a suit on bond for £53 *payable* in Virginia currency; the court held that there was no paper circulation held as current money in April, 1790; that the tender must be money current at the time of the tender, else it is not a legal tender, and that the currency named in the bond having ceased to be current money would not do to tender; that the legal effect of the bond was to pay £53 in such currency as was current at the time of payment.

In United States *vs.* Robertson, 5 Peters, 644, the Supreme Court of the United States, by Chief Justice Marshall, said: "An obligation to payment generally is discharged by a payment in legal currency."

It will be perceived that the debtors derived the benefit from the alteration of the currency in the recited English cases, whilst the creditors derived the benefit in the American cases.

In the debasement of the gold coins by Congress, the debtors derived a great benefit; but these benefits to private parties
88 were not the moving motive of either England or America, are merely incidental to a great public policy, adopted to meet the exigencies of the times, protect the public, and perpetuate the government.

Private interest, including gains and losses, must be secondary and subsidiary to the great public policy so essential to the protection and preservation of the government. An overruling necessity has required of Congress another change in the lawful current money of the country; the private interest of the debtor class is benefited by this change, and the creditor class may be injured; but why should the creditor, any more than the debtor, be permitted to obtrude his private interest to thwart an essential public policy?

These powers were given for wise and beneficent purposes. It was not to be presumed that Congress would lightly trifle with the great interest of the community, work a revolution in the currency and commerce of the country, without the most urgent necessity.

The necessity for these changes cannot be foreseen and provided for, but must be acted on when presented. The hazards of such changes are mutual; no man can, therefore, rightfully complain of the injustice of his government when these changes are so cautiously made, and for such weighty reasons. The love of gain may not be gratified, and private cupidity may be disappointed, but the patriotic will find ample compensation for his incidental losses in the welcome reflection that his government has been rescued from ruin, its free institutions perpetuated, his private fortune secured from wreck and ruin, and his individual liberty and the liberty of his posterity guaranteed by the preservation of the government, and that this legal-tender act has contributed much to this preservation.

Now that many hundreds of millions of dollars of this currency has found its way into circulation, the commerce of the country has been adapted to this new medium; millions upon millions of both public and private liabilities entered into upon the faith that it was a legal tender; hundreds of banks organized upon this basis, with many mil-

lions of circulation; the soldiers and sailors been paid with it for their perilous and meritorious services, neither justice nor sound policy requires that this new state of affairs should be unsettled, another commercial and financial revolution produced, private fortunes wrecked, private rights disturbed, and the great interest of society wantonly tampered with.

89 Before courts should be expected to pronounce judgments thus unsettling acts of Congress, the great business of communities, and producing such momentous and sad results, a stern, unrelenting necessity to preserve the Constitution should be clearly demonstrated.

There is but one legal standard by which to measure the payment of debts, and that is to require the debtor to pay the number of legal dollars which may be called for by the contract and adjudged against him.

The law does not admit of any difference in the value of dollars of its legal currency, however the market value of the one or the other currency may differ or vary. The gold dollar declared to be a legal tender will discharge precisely a dollar, nothing more; the treasury note dollar declared to be a legal tender will discharge precisely a dollar, nothing less

This rule of the law is plain, easy, and simple, and harmonious in all its workings. Depart from it, and confusion and embarrassment meet us everywhere.

The discharge of debts is rendered complicated and uncertain. If a debtor cannot pay a thousand dollars of his indebtedness with a thousand dollars of any currency, made a legal tender by law, what amount of such currency will discharge it? Who is to ascertain the amount which will be required? And by what means is it to be ascertained? By what market or standard can it be ascertained? Is the court pronouncing the judgment to say it may be discharged by the payment of one amount of one kind of legal currency, and by a different amount of another kind of legal currency? What law authorizes any such judgment? If the court is not to do it, is the collecting officer to determine this? And if so, is he to hear the conflicting evidence of witnesses, and be governed by the conflicting values of different markets? or how is he to arrive at just and certain conclusions? And is he to judge at his peril, or is he to be wholly irresponsible? Is his judgment to be final, or subject to revision? And if subject to revision, by what mode of operation, and by what forum?

These questions are suggestive of the absurdity of departing from the harmonious, simple, and uniform rule of the Constitution and the laws to regard dollars, declared by law to be a legal tender, of the same exact value, whether of coin or paper, regardless of the market value of either or both. With this rule the duties of courts and collecting officers are simple, first for the courts to ascertain how

90 many dollars are to be paid, and then for the collecting officer to ascertain whether the currency offered is of either kind made by law a legal tender.

Much light has been shed upon this subject by the able opinions of Judges Daviess, Balcom, Wright, Emmott, and Marvin, of the appellate court of New York, in the case of Meyer *vs.* Roosevelt, and other cases tried at the same time; and by the United States Court of Claims, opinion by Chief Justice Casey, in Latham *vs.* United States, March 6, 1865.

Respect for the legal learning and integrity of my two colleagues, Peters and Robertson, would have made it agreeable to concur with them, but for my own conscientious convictions that this act was but the exercise of constitutional power by Congress. The disagreeable necessity of dissenting from their opinion is, however, to some extent relieved when I reflect that the constitutionality of this act was upheld by the experienced and able circuit judge who presides over the 13th district, in one case, and by that learned jurist, the venerable chancellor of the Louisville chancery court, in two other cases now before this court.

91 *Appeal from Meade circuit court.*

W. C. GRISWOLD, appellant,
vs.
A. L. POPHAM *et al.*, appellees.

SEPT. 17TH, 1864.

The court being sufficiently advised, it seems to them that the judgment herein against Griswold, and that also against Allen, is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for further proceedings, which is ordered to be certified to said court, and that said appellant recover of said appellees his costs herein expended.

92 UNITED STATES OF AMERICA, *District of Kentucky, ss:*

The President of the United States of America to the judge of the court of appeals for the State of Kentucky:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said court, before you, between Henry A. Griswold, pl'ff, and Susan P. Hepburn, H. P. Hepburn, and other, defendants, a manifest error hath happened, to the great damage of said H. P. and Susan P. Hepburn, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at the city of Washington, together with this writ, so that you have the same at the city of Washington on the first day of
93 our next December term; in the said court, to be then and there held, that the record and proceedings aforesaid being in-

spected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of said court, at Louisville, in said district, this twenty-third day of June, A. D. 1865, and of the independence of the United States the 89th year.

[SEAL.] A. J. BALLARD, *C. C. C. K. D.*

Allowed.

WM. SAMPSON,
Chief Justice of Kentucky.

94 UNITED STATES OF AMERICA, *District of Kentucky, ss:*

[L. S.] The President of the United States of America to the judge of the court of appeals for the State of Kentucky:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said court, before you, between Henry A. Griswold, plaintiff, and Susan P. Hepburn, H. P. Hepburn, and others, defendants, a manifest error hath happened to the great damage of said H. P. and Susan P. Hepburn, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning to the same, to the Supreme Court of the United States, at the city of Washington, on the first day of our next December term, in the said court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said
95 Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of said court, at Louisville, in said district, this twenty-third day of June, A. D. 1865, and of the independence of the United States the 89th year.

[SEAL.] A. J. BALLARD, *C. C. C. K. D.*

Allowed.

WM. SAMPSON,
Chief Justice of Kentucky.

96 *Supersedeas bond.*

Circuit court of the United States, sixth circuit and district of Kentucky.

SUSAN P. HEPBURN, plaintiffs in error,
against
H. A. GRISWOLD, defendant in error.

Know all men by these presents, that we, Susan P. Hepburn and John W. Barr and Sidney J. Rogers, are held and firmly bound unto

the above-named H. A. Griswold in the sum of seventeen thousand dollars, to be paid to the said H. A. Griswold, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 27th day of June, A. D. 1865.

Whereas the above-named Susan P. Hepburn hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the court of appeals for the State of Kentucky, sitting at Frankfort, against the said Hepburn, in the case of
97 the Susan P. Hepburn and al.:

Now, therefore, the condition of this obligation is such that if the above-named Susan P. Hepburn shall prosecute the said writ of error to effect, and answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

JNO. W. BARR. [L. S.]
SIDNEY J. ROGERS. [L. S.]

Taken and acknowledged before me this 27th day of June, A. D. 1865.

WM. SAMPSON,
Chief Justice of Kentucky.

STATE OF KENTUCKY,
Court of Appeals, Clerk's Office.

I, Leslie Combs, clerk of the court for the State of Kentucky, do hereby certify that the foregoing pages of written paper, together with twenty-three pages and about one half of a page of printed matter, contain a full, true, and complete transcript of the record and proceedings in the case therein mentioned, as the same
98 is of record and on file in my office.

In testimony whereof, I have hereunto signed my name as clerk of said court, and affixed the seal of said court, this 2d day of December, 1865, and in the 74th year of the Commonwealth.

[SEAL.] LESLIE COMBS,
Clerk of the Court of Appeals.

Fee for transcript	$26 95
Office seal	1 00
	27 95

99 UNITED STATES OF AMERICA, *District of Kentucky, ss:*

To Henry A. Griswold, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at city of Washington, on the first Monday of December next, pursuant to a writ of error

filed in the clerk's office of the court of appeals for the State of Kentucky, wherein H. P. Hepburn and Susan P. Hepburn are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Wm. Sampson, chief justice of the court of appeals for the State of Kentucky, this twenty-seventh day of June, in the year of our Lord 1865, and of our independence the 89th.

WM. SAMPSON,
Chief Justice of Kentucky.

100 Executed the within on the within-named Henry A. Griswold by delivering to him a copy of the within, June 28, 1865.

W. A. MERIWETHER,
U. S. Marshall, K'y Dist.

Marshal's fees, $2 50.

W. A. Meriwether being sworn, says that on this day he served a copy of the within citation on Henry A. Griswold.

W. A. MERIWETHER.

Subscribed and sworn before me this 28th of June, 1865.

A. J. BALLARD,
Cl'k U. S. Dis. C't, K'y Dis.

SUPREME COURT OF THE UNITED STATES.

IN ERROR FROM

COURT OF APPEALS OF KENTUCKY.

S. P. HEPBURN, PLAINTIFF,

vs.

H. A. GRISWOLD, DEFENDANT.

No. ~~241~~.

Argument of William Preston, of Counsel for Plaintiff.

LOUISVILLE, KY.

COURIER STEAM BOOK AND JOB PRINTING ESTABLISHMENT.

1867.

NOTE.—This cause was set for trial at the last term, but was not reached. The case of *Thompson* vs. *Riggs*, not yet reported, may be considered as settling the constitutionality of the Legal Tender Acts, by this Court. It is true the opinion does not directly discuss the question, but the instructions of the Judge in the inferior court, and the pleadings and the briefs presented the issue, together with others, upon which the judgment was affirmed. A mere reference to that case would, it is supposed, be sufficient; but as the court did not review the State decisions affirming the validity of the Acts, nor directly express its own opinion, this argument is filed, in the hope of presenting such gleanings from other sources as may have been left ungathered.

DECEMBER 18, 1867.

SUPREME COURT OF THE UNITED STATES.

In Error to the Court of Appeals of Kentucky.

HEPBURN, v. GRISWOLD. } ARGUMENT FOR PLAINTIFF IN ERROR, BY W. PRESTON.

MAY IT PLEASE YOUR HONORS:

Statement of case.

The only question presented before the Court in this case is in regard to the constitutionality of the act of Congress of the 25th of February, 1862, and other subsequent acts, authorizing the issue of Treasury notes, and declaring them to be a legal tender in payment of all debts, public and private, in the United States.

In the year 1861, the defendant in error, Griswold, filed a petition in the Louisville Chancery Court against S. P. Hepburn, and others, praying for an attachment and decree to enforce the payment of a promissory note for eleven thousand two hundred and fifty dollars, due upon the 20th of February, 1862, which he held. The answer admitted the claim, but alleged the tender of Treasury notes, which the defendant in error refused to accept. Upon hearing, the Chancellor discharged the attach-

ment, and decided that the Treasury notes were a good and valid tender. An appeal was prayed, and the opinion of the Chancellor was reversed by the Court of Appeals of Kentucky. The case has been brought by writ of error to this Court for final review.

Question.

The question thus presented to this Court is of the first magnitude. It would be difficult to exaggerate its importance. The greatest perils which ever beset the nation caused Congress to pass the acts in question, at a time when feebler measures would have ended in the dissolution of the Government. The whole land was involved in civil war. The Southern States had seceded and proclaimed a new government, with organized civil and military administrations, and formidable armies, flushed by the successful campaign of 1861, which were maintaining the Confederacy in the field. The Government was compelled to consent to the dismemberment of the Republic, or exert every power for its preservation. Vast armies were levied and navies equipped with lavish expenditures unknown in the history of the world. The collected coin of all the great nations of Europe would have been inadequate to pay the expenses of the war. The gold and silver of the United States, if seized for the use of the Government, or wrung from the people, would have been insufficient to meet four months' expenditures, though the country had been drained to its last dollar. It was under such circumstances that the Congress of the United States passed the act of the 25th of February, 1862, authorizing the issue of

Exigencies that led to the acts of Congress.

$150,000,000 of Treasury notes, which they declared "shall also be lawful money and a legal tender in all debts, public and private." Gold and silver at once disappeared from circulation, and were replaced by Treasury notes. Redoubled energy was infused into every department of the Government. New acts authorizing profuse issues of paper money, with almost identical words in regard to their being a legal tender in the payment of debts, were passed by Congress at short intervals. Between the 15th of February, 1862, and the 13th of June, 1864, five acts were passed authorizing the emission of $1,300,000,000 of paper money. The people approved the action of Congress. Treasury notes were every where conventionally received without reluctance or opposition. Many adjudications of the local tribunals and courts of last resort in the several States affirmed the validity of the acts, and declared that the power was rightfully exercised by Congress. The whole commerce, business and affairs of the country were adjusted to the new currency, and yet repose upon that foundation. Treasury notes became the money of account until the restoration of peace, and are yet the only currency. Soon after the close of the war the Court of Appeals of Kentucky, upon the 17th of June, 1865, pronounced in this case the acts in question unconstitutional and void. They considered that there was "no plausible ground" to sustain the constitutionality of the act of February, 1862, in regard to its provisions declaring Treasury notes to be money and a legal tender in payment of debts on private

Acts of Congress authorizing Treasury Notes.

Sustained by State Courts.

Declared Unconstitutional by Court of Appeals of Kentucky.

contract, but thought it was destitute of any such support, and was "clearly unconstitutional," and should not be enforced as law.

It is believed that the decision of the Court of Appeals of Kentucky, to which Judge Williams, one of the four Judges, dissented, in a separate opinion, is the only instance in which any Court of highest resort in the several States has ultimately held that the acts of Congress in question were unconstitutional and void.

In opposition to this view, it is maintained that whether the direct question involved and its collateral propositions are examined by the terms of the Constitution of the United States, and the grants of power to Congress contained in the instrument itself, or by the usages of sovereign States in giving plenary powers over money to their Government, or upon principle or by precedents, that Congress have not transcended their legitimate powers in the enactment of the laws in question.

The question now presented for the decision of the Court will require not only the learning of the Judge, but the application of the principles apparently more within the province of the statesman. This is the necessary consequence of the unusual and august jurisdiction confided to it by the Constitution. The question involves the just boundaries of power between sovereign Governments, and the exercise of authority indispensable to national existence. The legal questions have been examined, since the passage of the acts, with such research and ability, that, it is hoped, the Court will view with

indulgence the character of argument and historic illustrations, invoked in support of the powers of Congress, under the Constitution.

State Decisions on question.

The Supreme Court of the First Judicial District of New York decided, not long after the passage of the act, that Treasury Notes were not a legal tender in the satisfaction of a mortgage debt. The Supreme Court of New York, in the Third District, about the same time, held the acts of Congress to be Constitutional. The two cases were brought up together before the Court of Appeals of New York, at its September term in 1863. After elaborate opinions by the several Judges of the Court, the Constitutionality of the acts was affirmed.

The Court decided that the power of Congress to pass the acts could be implied as necessary and proper from the express power to borrow money granted by the Constitution. The majority of the Judges did not wish to be understood that the same thing could not be done by virtue of the authority of Congress to levy and collect taxes, or to regulate commerce, or to coin money, or grant other expressly enumerated powers, or groups of powers. Judge Marvin decided the right from the power to regulate commerce. Judge Balcom held that the acts were necessary, under the power, to borrow money, to raise and support armies, to provide and maintain a navy, and to provide for calling forth the militia to suppress insurrections.

Metropolitan Bank v. Van Dyck, 27 N. Y. Rep.

In the course of the succeeding year, 1864, the Supreme Court of California, in the case of Lick v.

Faulkner, declared the act valid. CURRY J., in delivering the opinion of the Court, derives the power of Congress to pass the act and make the notes a legal tender, as necessarily implied from the power to declare war and suppress insurrections. The reasoning and principles in the case of the Metropolitan Bank v. Van Dyck, by the Court of Appeals of New York is approved and affirmed, though the Court chooses to trace the power to the authority specificially given to declare war and suppress insurrections, without controverting that it may be necessarily implied from the power to borrow or other express powers in the instrument.

Lick v. Faulkner, Pamphlet Reports, 1864.

In the case of Thayer v. Hedges, an opinion adverse to the act was given by Perkins J. (22 Indiana 283,) but the judgment was subsequently set aside, and, in February, 1865, the validity of Treasury notes as a legal tender was declared by the Supreme Court of Indiana.

In Hintrager v. Bates, at the December Term, 1864, the Supreme Court of the State of Iowa, held that a mortgage creditor in equity, as well as at law, was obliged to accept Treasury notes in discharge of his mortgage.—17 Iowa Reports; Troutman v. Goring, 16 Iowa Rep.

In Shoenberger v. Watts, in the Philadelphia District Court, reported in 1 American Law Register, N. S., 553, a bond was sued, upon which had been executed some years before the act stipulating for the payment of $28,000 "*in specie, current gold and silver money, of the United States,*" and that no

future laws allowing payment to be made in any other money should affect the contract, and agreeing that the obligors "*expressly waived the benefit of such laws.*" Judgment was entered and an execution issued for "specie, current gold and silver money," but was set aside on motion. The Court held that a final judgment at law is necessarily for *lawful* money, and the debtor had a legal right to pay it in any money which the law has made a legal tender. Mr. Justice AGNEW of the Supreme Court of Pennsylvana, decided in Schollenberger v. Brinton, that when ground rent was payable in lawful *silver* money of the United States, it might, like other debts, be discharged in legal tender notes.—3 American Law Register, N. S. 591.

Some of the cases cited have not been accessible in the original Reports, but are taken from the law magazines and other sources. See Borie v. Trott, 21 Legal Intelligencer, 68, 92, 101. Meyer v. Roosevelt, 27 N. Y. Reports, 400, Sanford v. Hayes, 22 Legal Intelligencer, 180. Shoenberger v. Watts, 10 Am. Law Rep., 553, Pa. Hayne v. Powers, 3 Leg. Observer, 170. Crocker v. Wolford, 20 Legal Intel., 316. Metropolitan Bank v. Van Dyck, 27 N. Y., 400. Philadelphia and Reading Railroad v. Morrison, 11 Legal Intel., 372. Patterson v. Blight, 21 Legal Intel., 84, 120. Kroever v. Calhoun, Ibid., 141. Shoellenberger v. Brinton, Ibid., 155. Mervine v. Sailer, Ibid., 148. Kinnike v. Matthews, 22 Legal Intel., 4.

No express power to issue Notes and declare them legal tender.

It is manifest by examining the Constitution itself, that there is no express power given to Congress to

issue Treasury notes, nor to declare that they shall be lawful money, nor to exact that they shall be a legal tender in the payment of public debts, nor in satisfaction of private debts. Neither does the instrument itself contain any inhibition forbidding the exercise of any such powers. It is silent. The authority, therefore, must be found in the vast, and, as yet, unexplored mass of implied powers, or it does not exist. It must be deduced, as a necessary and proper means of carrying into effect the powers expressly vested by the people in the Government of the United States, according to well-known and established rules of interpretation, requiring a construction of the import of the terms of the instrument in their ~~material~~ natural sense, without unreasonable restriction or enlargement.

Nor prohibition.

Money power as unlimited in the United States as other countries.

It would seem that the money power must exist *ex necessitate rei* somewhere in our Government as fully as in other sovereign States. There is nothing in the Constitution, nor any sufficient proofs in the history of the times, to warrant the conclusion that the people in establishing their organic law, intended to deprive both the general and local governments of the usual sovereign powers over money. If such a restriction exists in the United States, then it is the first instance in the history of the world that retraints have been imposed by the organic law upon the money power of a sovereign government. No State in Europe labors under any such restriction. From the earliest times, governments have always claimed the right to declare what commodity shall be money, and what shall satisfy debts, or fulfill the

judgments of their Courts. The proofs ought to be clear and overwhelming in the *instrument itself*, that the people of the country in adopting the Constitution intended to deprive both their State and Federal Governments of such an essential attribute of sovereignty. It is clear that the States have no right over the subject of coin, or money, or legal tender. They are expressly forbidden from entering into any treaty alliance or confederation from granting letters of marque and reprisal, and from coining money, emitting bills of credit, or making anything but gold and silver coin a tender in the payment of debts. On the other hand, it is expressly declared that Congress shall have power to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures, and to borrow money on the credit of the United States.

The several States have no power over money.

It is worthy of observation that these inhibitions upon the powers of the States are in juxtaposition, and embrace two classes of powers essential to the existence of a sovereign State, and which, probably, in the nature of things, are incapable of control or limitation by the organic law—the Treaty Power and the Money Power. The Constitution reposes the Treaty-making Power in the President and Senate, and the Money Power in Congress. The States have no concurrent power whatever with Congress, over the question of money, or legal tender, nor over the treaties. The analogies and reasoning applicable to the impossibility of restraining the one apply with full force to the other. The only difference is that many nations have jealously sought,

The Money and Treaty Power, in their nature, probably incapable of restriction.

by constitutions or municipal laws, to curb the Treaty-making Power, but none have ever made such efforts to fetter the Money Power.

The debates in the Federal and State conventions to form and ratify the Constitution, show the fears that were entertained that the Treaty-making Power might be exercised to dismember or destroy the Government. The most powerful and acrimonious attacks were made upon the Constitution on account of this clause, and various and conflicting opinions expressed as to the powers of the President and Senate. The Convention knew, however, that the power of making treaties is indispensable to the national sovereignty, and that it must belong exclusively, without limitation, or Constitutional restrictions, to the national Government. Experience and reason irresistibly demonstrated that to be efficacious, it must be indivisible, and that the power could not be limited or circumscribed so as to satisfy domestic fears, without the hazard of destroying its utility, and rendering it impotent in national emergencies.

Restrictions, if allowed, must be express.

Chancellor Kent holds that there can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty. He considers that the fundamental laws of a State may withhold the power of transferring what belongs to the State, but if there be no *express* provision of that kind, the inference is that it has confided to the department charged with the power of making treaties a discretion commensurate with all the great interests and exigencies of the nation.

It is true that the Government of the United States in reference to the disputed line of the North-Eastern boundary, declared that it had no power to cede the territory without the consent of Maine; but the better opinion seems to be that such power of cession does reside, exclusively, in the treaty making power, under the Constitution of the United States; though sound discretion might forbid the exercise of it without the consent of the local governments interested, "except in cases of necessity, in which the consent might be presumed." The absurdity of attempting to limit, by Constitutional provisions, the treaty making power was abundantly shown in the case of the Dutch United Provinces, whose fundamental law required the unanimous consent of the provinces to treaties. This restriction was disregarded by the treaty of Munster, and afterwards by the treaty of 1661. The treaty by which the United States now hold Florida is in violation of an express restriction upon the King by the Spanish Constitution, which forbids the monarch from alienating any part of the public domain.

By the Constitution of the United States it is declared that the President "shall have power by and with the advice and consent of the Senate to make treaties: provided, two thirds of the Senators present concur."

By this clause there is no express power given, either to acquire or cede territory. There is no pretense that any authority to purchase or cede foreign territory is given, or prohibited; but, yet, by force of the plenary, indivisible, and unlimited

grant of the power to make treaties, the United States have acquired Louisiana and other countries, and the right has been held as a just implication from the treaty power.

Plenary Powers presumed.

But if it conceded that the treaty making power can be restrained by the constitution of a State, yet a plenary authority will be presumed to exist, even to alienate the public domain, or will be implied, unless there be some *express* limitation in the fundamental laws of the State. No implication from the instrument itself, nor citations from the debates of the persons who formed it, nor evidences from the history or literature of the times, nor writings, nor declarations by eminent men should be permitted to create limitations upon such a power. By clear and well established rules of interpretation, where a power is granted in general terms like the treaty making power, it is to be construed as co-extensive with the terms of the grant, unless some clear restriction upon it is deducible from the context; nor can it be restricted because it might be susceptible of abuse, or injury to the Government or people.

Money Power ought to be as free as Treaty Power.

But, upon principle, the Money Power ought to be left as free as the Treaty Power, to meet the necessities and exigencies of the State. It is more indispensable. A State can exist without treaties, but it cannot exist without money. It is essential to every branch of administration. Not only the power to regulate coin, but the substitutes for coin when a dearth of the precious metals exists, may be said to be an inalienable attribute of sovereignty.

It cannot be restrained without producing langor or imbecility, when the metallic currency is insufficient for the necessities of the Government, and leaves a nation no alternative but destruction or usurpation. Chief Justice Marshall, in the case of Weston vs. the City of Charleston, 2 Peters, 458, in speaking of the power to borrow money, declares that the grant of the power is incompatible with a restraining or controlling power. 2 Peters, 458.

For these reasons it might be urged upon principle, that the Treaty-making and Money Powers are incompatible with a restraining or controlling power, either in the States or elsewhere, and in themselves are indispensable, indivisible, and inseparable attributes of sovereignty. But this is not necessary. It will be sufficient to establish, that under the Constitution, the people intended to confide the whole question of the currency to Congress, and to exclude the several States from any control or legislation over the subject of money and legal tender. The power of Congress over the Currency plenary.

The two principal clauses in the Constitution by which the people intended to vest the Money Power in Congress relate to coinage and borrowing. It is maintained that from these clauses alone, and the restrictions upon the States in regard to the same subject, there is an implied power to pass the acts in question, declaring Treasury Notes "shall be a legal tender in all debts, public and private." The following are the clauses from which the power is implied: Section 8, clause 2: To borrow money on the credit of the United States. Section 10, clause 5: To coin money, regulate the value thereof, and of Express power to coin and borrow, create implied power to issue notes. Clauses of Constitution from which power is implied.

foreign coin, and fix the standard of weights and measures. Section 10, clause 1: No State shall enter into any treaty, alliance or confederation, coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, &c., &c., &c.

States no power over currency.

It may be premised that the construction of these clauses of the Constitution, together, renders it indisputable that the several States relinquished all their rights in regard to treaties, coinage and paper money, or bills of credit. The power to make treaties was expressly delegated to the President and Senate, without any check or restriction. The power to coin, and fix the value of coins, was expressly delegated to Congress, and the power to emit bills of credit was also given by implication.

Congress can emit bills of credit.

The only real remaining question then is, whether, conceding that Congress have power to emit bills of credit, it may not affix to them the character, functions and qualities which the ratifying States themselves possessed at the time the Constitution was ratified.

Definitions of money.

It is of importance to consider the true nature and definition of money, in connection with these two clauses. No word has given rise to more fallacies among philosophers, statesmen and jurists. It should be considered not only in its general nature, but according to the sense in which it was used at the time the Constitution was adopted.

The definition of money given by the Chief Justice of Kentucky, though somewhat resembling that given by Blackstone (1 Comm, 275), is not consistent

with that given by many eminent and most modern writers. In the opinion of the Court, it is said "Money being the universal standard of value and measure of exchange, foreign and domestic, to make and regulate money, is one of the highest and most essential attributes of national sovereignty."

No universal standard of value.

There is no universal standard of value and measure of exchange, foreign and domestic, any more than there is an universal language, or universal standard of weights and measures. The fineness of the coin, and its value, is fixed by the Legislatures of each country, and its denomination and value declared. The Spanish dollar is worth more than the American dollar, and much more than the Prussian or German dollar. Spanish ounces vary from $15 to $17 according to the place of coinage or circulation, and American silver and gold have no common standard or fixed relative value. No money is an universal standard of value. The statesmen of Europe have been long engaged in endeavoring to fix an European standard and common denomination for European money, but none ever has, or probably ever will be established as an universal standard of value.

Hume's Essay on Money.

Hume, in his essay, has defined money to be "the instrument which men have agreed upon to facilitate the exchange of one commodity for another." Say attributes its origin to custom rather than law: "Custom, therefore, rather than law, and not the mandate of authority, designates the specific commodity that shall pass exclusively as money, whether crown pieces or any other commodity whatever." Franklin, in 1729, in his essay on a paper currency, and making

Say's Pol. Economy, 167.

2 Franklin, 264.

notes a legal tender, defined money to be any particular thing "which men have agreed to make the medium of exchange, whether gold, silver, tobacco or any other commodity." Franklin's view was adopted by the celebrated Adam Smith, nearly forty-six years after in his "Wealth of Nations." McCulloch describes, in preference to defining money, but in effect declares it to be anything, whether wines, corn, metals, coin, paper or any other commodity, used as a medium of exchange.

Smith's Wealth of Nations, 481.

The Court of Appeals of Kentucky assert that at the time "When the Constitution was adopted, as even yet, all foreign money was metallic coin, and, therefore, the power to regulate such coin, was constructively restricted to coined metal, and did not include notes on the Bank of England, or consols, or other Government bonds or securities, &c."

Inaccuracy of Court of Appeals of Ky.

The Court is inaccurate in its assertion. Paper money was introduced into Europe contemporaneously with the invention of printing itself. Its flexibility, lightness, durability and capability of being printed led to the substitution of paper and bank notes for coin, precisely as coin supplanted unfashioned metals, and they the first rude articles of barter and exchange.

At the time that the Constitution was adopted metallic coins and paper money constituted money, both in popular acceptation, and in the language of philosophers and jurists. The term money was fully understood, and was not confounded with consols or other Government bonds and securities.

The fallacy into which the Court of Appeals falls,

in confusing and classing Bank notes with consols and Government bonds and securities, was exposed by Lord Mansfield in Miller v. Race, 1 Burrows, 457, in a decision rendered in 1758. Lord Mansfield's definition of money.

"But the whole fallacy of the argument turns upon comparing Bank notes to what they do *not resemble*, and what they *ought not* to be compared to, *viz:* to goods, or to securities, or documents for debt.

"Now, they are *not* goods, nor securities, nor documents for debts, nor so esteemed, but are treated as *money*, as *cash*, in the ordinary course and transactions of business, by the general consent of mankind, which gives them the credit and currency of *money*, to *all* intents and purposes. They are as much *money* as guineas themselves are, or any other current coin, that is used in common payment as *money* or cash."

The opinion of Lord Mansfield is quoted by the Court of Appeals of Kentucky, and was followed in the case of Jones v. Overstreet, 4 Monroe 551, by Chief Justice Bibb, in which the notes of the Commonwealth's Bank were considered as money. Followed by Court, Chief Just. Bibb.

In the case of the United States v. the Bank of Georgia (10 Wheaton 347) this Court held that Bank notes constitute a part of the common currency of the country, and ordinarily pass as money. They are a good tender, as money, unless specially objected to. 10 Wheaton, 367

If, however, we turn from such definitions of money to history, we will find that the broad asser-

tions in the opinion of the Court of Appeals of Kentucky cannot be maintained.

Historic error of Court of Appeals.

The Chief Justice of Kentucky asserts that there are multitudes of historic examples to illustrate the great practical difference between coin and paper money. He states that England never declared the notes of her great bank to be money, and that her omnipotent Parliament was too statesmanlike and self-denying to declare them a legal tender. Other allusions are made, in the same connection, to the French assignats and the bills of credit emitted by the confederation. The purpose seems to be to show that those governments never thought of making nor attempting to declare paper money a legal tender. This is an error. The Bank of England notes are at this time a legal tender. When the Bank of England was re-chartered in 1834, its notes were not a legal tender, but by the Statute, 3 and 4 William IV., Bank of England notes were made a legal tender for all sums above £5, every where, except at the bank and its branches. The motion was carried by Mr. Baring and Lord Althorp, against Robert Peel's strenuous opposition, and was found to be a very great improvement. Such notes are now a legal tender.—Annual Register, 1833, p. 165.

The French assignats were made a legal tender. In 1795 they were a legal tender at par, and, coupled with the law of the *maximum*, gave that immense energy to France which enabled her to baffle the whole power of Europe.—1 Allison Hist. Europe, p. 382.

In our own country the power of the Government to make paper money a legal tender was often exercised without dispute.—Ware v. Hylton, 3 Dallas, 270.

Issues of paper money by Colonies as legal tender.

The first bills of credit, or bank notes, issued in this country, were those of Massachusetts, 1690, about the time of the incorporation of the Bank of England, which were made a tender for debts due the province, but not private debts. There was a subsequent issue in 1703, and an act of 1712 made them a tender in payment of private debts. This is believed to be the first act ever passed in England or America making paper money a legal tender in the payment of private debts. In 1720 Rhode Island issued bills of credit, which were made a tender in payment of debts. Connecticut, between 1709 and 1731, passed similar acts, and New York and Pennsylvania issued bills of credit, which were made a legal tender. In Virginia, bills of credit were issued as early as 1755, under the name of Treasury notes, which were made a tender in payment of debts, and many such issues were made by that State. By some it has been contended that it is of the essence of bills of credit that they should be a legal tender.—Opinion of Judge Story, (Briscoe on the Bank of the Commonwealth of Kentucky, 11 Peters, 337.)

Neither does the Congress of the old Confederation merit the eulogy of the Chief Justice of Kentucky when he states: "Nor under all its besetting temptations did the Congress of the Confederation,

with express power to emit bills of credit, ever issue them as money or a legal tender."

Though it is true Congress did not declare paper issues a legal tender, yet the forbearance shown was not such as the passage would indicate. Judge Storey, in speaking of these issues, says: "Congress endeavored to give them additional credit, by declaring that they ought to be a legal tender in payment of all private and public debts; and that a refusal to receive the tender ought to be an extinguishment of the debt, and recommended the States to pass such tender laws. They went even further, and thought proper to declare that whoever should receive this paper in exchange for any property, as gold and silver, '*should be deemed an enemy to the liberties of these United States!*'"—Storey on the Constitution, Sec. 1359. In consequence of these measures, eight of the States declared the issues should be a good and legal tender.

Before the Constitution was adopted, the provinces did not exert the coining power which pertained to the Prerogative of the King; but in times of scarcity or under provincial emergencies, often exercised the right to issue bills of credit, or Treasury Notes, as they were styled, in Virginia. They did not claim the power to *coin*, but to furnish a paper *substitute* for coin, which would satisfy contracts, and discharge obligations in their own courts. It is, moreover, indisputable, that the colonies made their bills of credit, interest-bearing or non-interest bearing, a legal tender or not a legal tender, as they thought

proper, both before and after the Declaration of Independence.

Definitions of bills of credit

The Treasury Notes issued under the acts in question are, doubtless, bills of credit, which are defined by this Court to be "A paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money."—Briscoe v. the Bank of this Commonwealth of Kentucky, 11 Peters; and Craig v. Missouri, 4 Peters, 410.

No express power to issue bills of credit

There is no express power to issue Treasury Notes or bills of credit at all in the Constitution; yet, as an implied power, it has been considered clear since the early days of the Republic. The acts of Congress of Feb. 25, 1813, Dec. 26, 1814, 31st Aug., 1842, July 22, 1846, and 28th January, 1847, authorized the issue of Treasury Notes to meet the emergencies of the nation. None of these acts made the Treasury Notes a legal tender in the payment of private debts; but the act of the 4th March, 1814, made the notes issued under it a legal tender between the holders and the Government; and in Thorndike v. Mason (2 Mason, 1) Judge Storey declared such notes were a good and legal tender to satisfy a bond to the U. S. Collector, at Boston. The debates on these acts, and the views and declarations of the most eminent men might be cited, were it necessary to show the rightful authority of Congress to issue Treasury Notes and make them a legal tender in all debts except private debts; but if the power to issue, and the right to make them a legal tender be conceded, then what is there in the Constitution itself to restrict Congress from declaring that they

Treasury Notes declared to be legal tender by J o .

Congress can attach the quality of legal tender to all notes.

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proper, both before and after the Declaration of Independence.

Definitions of bills of credit

The Treasury Notes issued under the acts in question are, doubtless, bills of credit, which are defined by this Court to be "A paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money."—Briscoe v. the Bank of this Commonwealth of Kentucky, 11 Peters; and Craig v. Missouri, 4 Peters, 410.

No express power to issue bills of credit

There is no express power to issue Treasury Notes or bills of credit at all in the Constitution; yet, as an implied power, it has been considered clear since the early days of the Republic. The acts of Congress of Feb. 25, 1813, Dec. 26, 1814, 31st Aug., 1842, July 22, 1846, and 28th January, 1847, authorized the issue of Treasury Notes to meet the emergencies of the nation. None of these acts made the Treasury Notes a legal tender in the payment of private debts; but the act of the 4th March, 1814, made the notes issued under it a legal tender between the holders and the Government; and in Thorndike v. Mason (2 Mason, 1) Judge Storey declared such notes were a good and legal tender to satisfy a bond to the U. S. Collector, at Boston. The debates on these acts, and the views and declarations of the most eminent men might be cited, were it necessary to show the rightful authority of Congress to issue Treasury Notes and make them a legal tender in all debts except private debts; but if the power to issue, and the right to make them a legal tender be conceded, then what is there in the Constitution itself to restrict Congress from declaring that they

Treasury Notes declared to be legal tender by J o .

Congress can attach the quality of legal tender to all notes.

produce this result, the probable operation of a National Bank will merit consideration; and if neither of the experiments be deemed effectual, it may become necessary to ascertain the terms upon which *the notes of the Government* (no longer required as an instrument of credit) shall be *issued* upon motives of policy, as a *common medium of circulation.*"

The Debate in 1788 shows Mr. Madison knew from the universal practice of the times, that the power to emit bills of credit, carried with it the right to make them a legal tender or not, at the pleasure of the Legislature authorizing the emission. He proposes, therefore, to compromise the matter by allowing the emission, but prohibiting Congress from making such issues a legal tender. In this he did not succeed; but the clause authoring the issue of such bills of credit was stricken out. He afterwards urged and obtained the issue of Treasury notes in the war of 1812, and by the act of 1814 such issues were made a legal tender for public debts by Congress, and supported by the Courts. The Congress of 1863, in declaring their issues should be a tender for private debts, merely exerted an additional but usual and ordinary power, incident to the acknowledged power to emit bills of credit.

Reasons why convention did not restrain issues of notes.

But the inquiry rises with irresistible power, if the framers of the Constitution had so recently experienced all the afflictions of a paper currency, why did they not limit it expressly. The reason seems to be that they knew the impossibility of restraining the money power, without unwisely fettering the Government, and, therefore, left it, not without considera-

tion, but without imposing any restrictions, for precisely the same sort of considerations that made them refrain from putting any express restrictions upon the treaty powers, though the Debates on the Constitution abundantly prove how reluctantly the Conventions conceded the power, without limitation, to the President and Senate.

Answer to objection to Court of Appeals.

The Court of Appeals of Kentucky concedes the power of issuing bills of credit to borrow money, but draws a distinction, and denies the power of Congress to issue them to make money.

The answer to this is that, in point of fact, bills of credit were never, in finance, issued to borrow coined money, but only when coined money could not be borrowed. They were always issued as a *substitute* for coin, and possessing all of the attributes of coin which the Legislature might choose to impart, in order to supply a deficit of coin in the currency. It is of the essence of a bill of credit that it shall be issued by a government, and intended to circulate as and be money. Mr. Justice McLean, in delivering the opinion of the Court in Briscoe v. the Bank of Kentucky, says: "They were, perhaps, never convertible into gold and silver immediately on their emission; as they were issued to supply the pressing wants of the Government, *their circulating as money* (i. e., coin,) *was indispensable.*"—11 Peters, 312. It was argued in Briscoe v. the Bank of Kentucky that, to be a bill of credit, the quality of being a tender for debt was essential, (11 Peters, 332); but while this was shown to be usual, it was not estab-

lished as universal. Bills of credit are introduced to make, not to borrow money for the State.

Introduction and History of Money.

If we trace the history of money we will find it divided into three great eras. The first, when rude commodities of barter alone existed; the second, when metals or coin were the only currency; and the third and last refinement of civilization, when paper money was introduced as the principal instrument of exchange.

Labor-saving effects of Money.

Of all the labor-saving machinery among men, there is none which so augments human power as money. Its office, like ships and railways, is to remove all obstacles between producer and consumer. Treasury notes, or a bag of gold, enables an emigrant from New England to California to save the transportation of commodities that would freight a ship. An eminent economist computes that $60 employed in circulation of bread in England, maintains a greater commerce than a ship that has cost $30,000 engaged in effecting exchanges between the producers of cloth in Manchester and tea in China. War multiplies the necessity and increases greatly the uses of money, and it must be under the exclusive control of the Government having the right to declare and carry on war.

Carey on Wealth

Cruelties of war before introducing money.

The most cruel and unjust way in which the losses of war can be apportioned upon a people is when, from the want of money, States seize commodities in kind. Money is the most perfect and admirable instrument to secure equitable contributions for the expenses of war. The medieval

and ancient wars, conducted by taxes in kind, inflicted frightful severities upon society.

Devastation, like that of a Tartar horde, follows in the narrow but terrible track of armies, supported by contributions in kind; but through the instrumentality of money, the burthen of war becomes supportable, by being diffused among the whole people.

Paper money was the last and most perfect improvement of civilization for such purposes, and all modern civilized States have used it as an indispensable means of easing and distributing the burthens of the State when the currency was insufficient.

Debasement of money.

The power of a State to debase money or to create a substitute when there is a deficiency of coin, or to pass bankrupt laws under great public necessities, has always been a subject of much inconsiderate invective; but it may be truly said that the only criterion for the moralist, the jurist or statesman to decide whether such exercises of power are just or unjust, must depend upon the dangers or necessities of the people. The debasement of coin was the early remedy against the hardships of the primitive system. The avidity of men to obtain money, whether debased or not, has always been the earliest and justest way for a Government to apportion among its people the costs of conquest or defeat.

The Court of Appeals of Kentucky evade the whole question as to the power of Congress to debase the coin at pleasure, by assuming that such a remedy cannot be apprehended. "But we will first

say that a debasement of the coin, for the wanton crime of degrading or destroying it, is a crime so rare and disgraceful as not to be apprehended in an age of Christian light and morality."

The sentence is so framed in connection with the context immediately preceding, that it is doubtful whether mere debasement or "wanton" debasement constitutes the crime mentioned. If the latter be meant, it is not a rare, but utterly unknown crime in history. No instance can be adduced where any State, for the "wanton" purpose of degrading or destroying its coin, was ever mad enough to debase it. But if the Court mean to say, that mere debasement of coin under national exigencies or necessities, is a crime so rare and disgraceful as not to be apprehended in an age of Christian light and morality, then the assertion is broad indeed, and the prediction would be against all history.

Before the introduction of paper money, debasement, or alteration of the denominations of coins, was the only resource of government in periods of national distress.

First debasement of coin in Europe.

The first debasement of coin in Europe was by its most celebrated law-giver, Solon, in order to relieve the intolerable oppressions of Athenian debtors.

3 Grote's Greece, 100.

1 Ferguson's Rome, 96.

Rome altered the pound from twelve to two ounces, to defray the expenses of the first Punic war, when she burst with her armies beyond the confines of Italy, and established at home a broader popular liberty, and a nobler aristocracy, distinguished by personal qualities instead of the mere lustre of patrician descent.

In England, the King, by Prerogative, as the sole regulator and protector of commerce, of which money is the medium, is alone entrusted with the right to coin money. To use the language of the old law, the denomination of the coin is in the breast of the King. In regard to this, Lord Hale remarks, that to enhance the coin in point of current value, and denomination, both of which the King had a right to fix without the consent of Parliament, has nearly the same effect as an embasement of the coin. During the earlier Norman Kings, and until the reign of Edward III, the denomination of money had never been altered. The pound sterling was still the pound Troy of twelve ounces of silver, or about three times the present English pound sterling. It was during the splendid reign of that Conqueror that the debasement of money first took place, and the denomination of the coin was raised from twelve to twenty-five shillings in the pound by the exercise of his Prerogative. The subsequent conquests of Henry V, in France, caused the denomination to be raised to thirty shillings to the pound. Vast debasements took place in France, principally to expel the English, and break down the power of the great nobles, until the present franc of twenty c[illegible] represents the original livre of Troy's, or pou[illegible] twelve ounces of silver, so that the franc is now [illegible] sixty-sixth of its original value.

Debasements in England.

Hale's Pleas of the Crown, 192.

Chitty on Prerogatives, 196.

3 Hume's History of England, 122.

Debasements of coin have marked the most splendid successes and illustrious epochs that adorn the progress of civilization. With our ancestors this degradation of the coin resulted from the necessity

Debasements of coin attend national progress.

of relieving England from the thraldom of Norman Kings, and to enable her to take her imperial position among the nations of the world. The greatest debasement of coin in England occurred during a brilliant reign, when, according to the vivid picture of Macaulay, the banner of St. George was carried beyond the Pyrenees and the Alps; when the pennons of the Black Prince floated over Leon and Castile; when the arts of peace flourished amid the triumphs of war; when the cathedral of York and the spire of Salisbury rose; when the noble English tongue was first molded into form for historians and poets, and when John Wickliffe first aspired to know the truths of God, where bigots had been content to wonder and believe.

Paper money a substitute for debasement of coin.

The remedy of modern nations for a scarcity of the precious metals, has been the substitution of paper money, instead of resorting to the debasement of the coin, or alteration of its denomination. This has been the resource for inadequate supplies of the precious metals in the most civilized States of Europe and America. Its uses for the purpose of distributing the losses or burthen of Government are more perfect than coin. The debasement of coin averted the miseries of taxes and contributions in kind, but the whole weight fell at once upon the class of creditors receiving it. Paper money, by pledging the faith of the State and the industry and capital of the people, enables the burthen to be distributed over a whole generation or even apportioned or shared with posterity.

The Revolution of 1688, which established the

constitutional liberty of England, brought into existence the Bank which enabled the country to maintain its Protestant freedom against Catholic France and the Continental Powers. The first paper money issued as a legal tender by the infant Colonies was to shield their people against the savages. Massachusetts and South Carolina authorized issues of legal tender notes, because they had not sufficient coin to carry on war with the Indians. The legal tender bills of credit issued by many of the other Colonies were authorized for the purpose of aiding in the French war. The hundreds of millions issued by the Congress of the Confederation, and made legal tender by the acts of eight States, enabled us to achieve our Independence. The *assignats* and *mandats* of France empowered the people to throw off the despotism of the Bourbons, foil the monarchs of Europe, and establish a broader freedom. The same pages of Thiers which are quoted by the Chief Justice of Kentucky to show how destructive the assignats proved, refer alone to finance; but the historian relates the mighty energy and power they lent to France. England, by the suspension of the Bank act, from 1797 to 1821, practically established Bank of England notes as a legal tender, and by the aid she received from this measure finally crushed the power of Napoleon.

Paper money and civilization.

With these historic examples, and in view of the power of the King and Parliament to debase or alter coin in denomination or fineness, for the consent of Parliament was necessary to the latter, it cannot be doubted that Congress has a right to al-

ter, change, or debase money at pleasure. If they are confined by the money power to coin, or pieces of gold and silver stamped at the mint, and issued under the authority of law, they assuredly are unrestrained in their power to coin it of any fineness or weight they may think proper.

Mr. Webster, in his speech of the 25th of May, 1832, declares in general terms, that Congress has plenary and exclusive power over the currency, and it is manifest that it was intended they should establish a fixed and uniform rule for money throughout the United States.

Express grants of power should be aided and supported by judicial construction, to meet the necessities of the nation, and not paralyzed, to dispel vague and fanciful fears. Implications are granted to support and not fostered to destroy sovereign powers of government. If the end and object of the grant were to supply the people with coin and bills of credit, sufficient to constitute a currency adequate to their wants and the necessities of the government, is not the issue of Treasury notes, with a legal tender clause, useful to, or conducive to that end? Is not the relation of the means to the end, in the coining power, and the right to supply deficiencies in the coin, as logical, proper, and necessary means to carry out express powers, as the right implied in McCulloch v. Maryland, to incorporate a Bank and create an useful fiscal agent? Is it not clearer and more evident, than the implied power of the United States, as decided in Fisher v. Blight, to have priority over other creditors; or to the right of Con-

2 Cranch, 358.

gress to make internal improvements; or of the nation to acquire foreign territory?

So if, under the power to coin, the power to punish counterfeiting is implied, as in the case of the United States v. Marigold, why cannot the power to issue bills of credit, in aid of the coin, be implied? Can an implication be raised under the coining power, to confer criminal jurisdiction, and yet denied to aid Congress to create a substitute for coin, in a period when the whole country was menaced with dismemberment? What more direct relation under the acknowledged canons of construction is there between punishing the importation of spurious coin, and "coining money, and regulating its value," and to emit bills of credit which shall be lawful money, declared in the acts in question?

But the Court of Appeals of Kentucky cite the authority of Mr. Webster to the contrary. The speeches of statesmen, and debates, correspondence and opinions of eminent men, however interesting or illustrative, are not the surest lights for the examination of constitutional questions, and are far inferior to the instrument itself and judicial decisions upon its principles. But, if a similar indulgence be extended to a celebrated statesman, the author of the Declaration of Independence, it will be seen, he entertained views fully sanctioning, if they did not foresee the exercise of these powers by Congress. Knowing the financial necessities brought upon the country by the war of 1812, and writing to Mr. Crawford, on the 20th of June, 1816, he

enumerates three measures necessary to insure the permanent prosperity of the country:

"A second should enable us to meet any war, by adopting the report of the War Department, for placing the force of the nation at effectual command; and a third should ensure resources of money, by the suppression of all paper circulation during peace, and liscensing that of the nation alone during war. The metallic medium, of which we should be possessed at the commencement of a war, would be a sufficient sum for all the loans we should need during its continuance; and if the national bills issued be bottomed (as is indispensable) on pledges of specific taxes for their redemption, within certain and moderate epochs, and be proper denominations for circulation, no interest on them would be necessary or just, because they would answer to every one the purposes of the metallic money withdrawn and replaced by them." (See Jefferson's Writings, 4th vol., page 285.)

It is true that Mr. Jefferson did not foresee a war so great that the whole metallic medium of the United States would not be sufficient for a single campaign; but it is impossible to read these views without believing that he considered that Congress had an unrestricted and plenary power, both over the metallic coin and paper money of the country, which would warrant all the Acts they have passed, for the issue of Treasury notes during the civil war.

For these reasons, it is claimed that under the express power to coin money, Congress have the implied power, whenever it may be necessary and proper, to

issue paper money as a substitute for coin, and to declare it shall be money, as ordained in the acts authorizing the issue of Treasury notes.

Acts do not impair contracts.

But, it is urged, that even admitting that Congress possesses a power to declare a copper cent a dollar, under the power to coin, yet the acts in question are retrospective, and impair the obligation of contracts.

In the case of Evans v. Eaton, 2 Peters, C. C. Reports, 337, Justice Washington declares that there is no inhibition in the Constitution which forbids Congress to pass laws impairing the obligation of contracts, though such a power is denied to the States individually. Whenever a power is granted, and Congress exercises it, whether express or implied, the law is not invalid, because it may affect contracts retrospectively, or impair their tenor or obligation. The Bankrupt act of 1841, swept away a vast mass of commercial contracts by retrospective operation, but it was never held to be unconstitutional.

But it is denied that the contract is in any respect violated by the acts of Congress.

The promise was to pay "eleven thousand two hundred and fifty dollars." The meaning of the word "dollar" can, alone, be determined by Congress. It is the unit of our currency, and the legal tender in all money contracts or obligations. It may consist as under the act of 1793, of $371\frac{1}{2}$ grains of pure silver, or of a smaller portion of silver and more alloy; or may be reduced to the value of the Prussian dollar, which is worth three-fourths of our money. The courts cannot know any coin as a dollar, save that which the acts of Congress declare

to be a dollar, whether coined or printed, any more than the Queen's Bench could declare that a £5 note, issued by authority of Government, is not £5 sterling. In the forcible language of Judge Wright, of New York, a Treasury Note of the denomination of ten dollars is legally as valuable for the purposes of money as a coined eagle.—27 Smith's N. Y. Reports, 492.

A party must be considered as entering into a contract in submission not only to all laws which do, but which may affect his contract. If subsequent laws incidentally affect the contract, they cannot be complained of, for they were implied in the contract when it was made, and the private contracts of citizens cannot control the legislation of the Government.

At the time the tender in this case was made and refused, the Treasury Notes were, in the eye of the law, the number of dollars specified on their face, and being were as valuable as so many coined dollars would have been.

It is not maintained that Congress has a plenary power to impair the obligations of contract at pleasure in the States, without restraint; but neither can it be admitted that it can have no power to impair the obligation of contract in the States, except under the express power to establish an uniform system of bankrupt laws, as declared by the Kentucky Court of Appeals.

The plea of necessity.

But the Court of Appeals of Kentucky consider the necessity of the Government as an element that the judiciary should never hear nor heed, and regard

necessity as a "forlorn plea," neither sustained by reason nor history. It also proposes, or imagines, many expedients that Congress should have adopted in preference to the issue of Treasury Notes, such as unlimited taxation, and the pledge of the public revenue and lands, or the issue of interest-bearing notes.

The Courts have frequently declared that they cannot remain blind to the necessities, which all the world heard and heeded, and which caused Congress to pass the acts in question. They are considered and reviewed by the Judges of New York in the Metropolitan Bank v. Ván Dyck, 27 Smith's N. Y. Reports, 468, and their consideration has been admitted as essential by other Judges. The facts themselves best demonstrate that the exercise of the implied power was necessary and proper. It is only requisite to appeal to the intelligence of mankind to know whether the alleged necessity is a "forlorn plea," or is sustained by the fearful facts of the civil war.

Congress has the choice of means.

It would be contrary to the uniform course of this Court to consider whether Congress should have passed the acts in question to meet those necessities, or should have adopted, instead, the expedients suggested by the Court of Appeals of Kentucky. The choice of means, if the power exists, certainly belongs to Congress, and not to the Courts. If the law be not prohibited by the Constitution, and be really calculated to effect an object intrusted to the Government, the Court cannot pretend to direct the discretion of Congress as to the means to

be employed for its accomplishment. In the case of McCulloch v. Maryland, it was held, that if the power exist, any attempt to confine the choice of means to such narrow limits as should not leave it in the power of Congress to adopt any which might, in their discretion, be appropriate and conducive to the end, would be most unwise and pernicious, because it would be an attempt to provide, by immutable rules, for unforeseen exigencies, and would deprive Congress of its right to exercise its reason, and accommodate its legislation to circumstances.

But the Court of Appeals of Kentucky say that "had there been no other objection to the implication in this case, the fact that to make money and fix the law of tender are great substantive powers, *recognized and disposed of by the Constitution*, and, therefore, no power on that subject can be implied beyond or different from that expressed." (Opinion of Court, page 14.)

There seems to be a defect or omission in the sentence, but the meaning seems to be, that to coin money and fix the law of tender are distinct substantive powers.

This cannot be reconciled with a preceding part of the same Opinion (page 6) in which it is said:

Opinion, page 6.

"As every contract and every judgment for money will be legally discharged by the payment of money, just as every contract and judgment for any other thing itself; therefore, *proprio vi*, money will necessarily be a lawful tender, without any legislative enactment legalizing it as such; consequently, if the currency called United States Treasury notes can be

legally held to be money, as declared by the Act of February, 1862, the further declaration that it should be a *legal tender*, in contracts and judgments for money, was an *act of supererogation*."

In the first part of the Opinion, legal tender is not treated as a separate, substantive thing, but as a mere function or quality *proprio vi* of money, which would render any legislation in regard to it a work of supererogation. In the latter, it is declared to be a great substantive power, which cannot be implied. These views are in conflict.

If a substantive power cannot be implied, (and it is not controverted), then all substantive powers are express powers. A substantive power is synonymous with an express power under the Constitution. But, it is manifest, as before shown, that there is no express power given to Congress over legal tender, and, therefore, it is not pretended that Congress have a substantive power over tender.

Tender is defined to be an offer to pay a debt or perform a duty. It is a mere function or quality of money. It may be affixed to gold, silver, copper, paper, or any other commodity, by law, to pay a debt, as Congress may choose to declare. Before the 20th of February, 1857, under the acts of Congress, foreign coins were a legal tender; but by the act of 20th February, 1857, all former laws making foreign gold and silver coins a legal tender were repealed. The power of Congress to pass the acts cannot be doubted.

Money is not *proprio vi* a legal tender; neither is legal tender a substantive power. It is a function

of money, which may be granted or not by the Government, at its pleasure. In England, gold alone was once a tender; in other countries gold or silver is a good tender. The Treasury notes were legal tender at the time the tender was made in this case; and the Courts cannot question what the proper Legislature declares shall be a legal tender in the payment of debts.

But if it be considered by this Court that the power of Congress is not perfectly clear, yet, in respect to the nature of the power, and the supreme necessities that existed for its exercise, the acts of Congress should be sustained.

The principles established in Fletcher v. Peck, 6 Cranch, 128, and Ogden v. Saunders, 12 Wheaton, 294, declare, that to authorize this Court to set aside a law as unconstitutional, the opposition between the Constitution and the law must be clear and plain. Chief Justice Marshall declares that it is not on slight implications and vague conjectures that the Legislature is to be presumed to have transcended its powers, and that its acts are to be considered void.

A law ought seldom, if ever, to be decided as repugnant to the Constitution in a doubtful case. (Fletcher v. Peck, 6 Cranch, 128.) It would be impossible to apply these rules to this case, without supporting the validity of these important acts of Congress.

In submitting the case to the Court, it may be said in conclusion, that this argument has been presented not so much in the hope of adding anything

to the powerful authority of the decisions of the State Courts which have declared the acts valid, as to reply to some of the propositions advanced by the Court of Appeals of Kentucky in reversing the judgment of the Louisville Chancery Court. The counsel for the plaintiff in error relies upon the principle established in those decisions to reverse this case. It is believed that this Court will not by its arbitrament annul and forever hereafter forbid the exercise of powers by Congress which gave strength and independence to the feeble American Colonies, which have maintained the authority of the Union during the fearful ordeal of the civil war, and which, in the future, may be essential to the preservation of the Republic.

SUPREME COURT OF THE UNITED STATES.

In Error to the Court of Appeals of Kentucky.

HEPBURN *et al.*, *Pltffs in Error*,
vs.
H. A. GRISWOLD.

BRIEF FOR DEF'T IN ERROR.

The Case Stated.

(1) The only question in the case is whether treasury notes issued by authority of the act of Congress of February 25, 1862, are legal tender at their nominal value for a debt contracted previous to the passage of the act.

Suit was originally brought, in the Louisville Chancery Court, to recover a debt evidenced by note dated June 20, 1860, and due February 20, 1861. The amount of the note, with costs, was paid into court in United States Treasury Notes at their face valuation, whereupon the Chancellor ordered a decree to be entered declaring the claim paid.

An appeal was taken from the decree of the Chancellor on the grounds that the treasury notes are not lawful money—are not valid tender—and that the amount paid was not enough to satisfy the debt. The Court of Appeals reversed the decree, declaring the act of Congress in question unconstitutional.

Previous Judicial Decisions of this Question.

(2) Any one who has studied the judicial opinions sustaining the law can not fail to have been struck with the vagueness and indefiniteness of the processes of reasoning by which, in many cases, their authors seem to have been brought to their conclusions in the premises. Starting far off—in the clouds almost—with misty notions of the origin and abstract nature and attributes of government in general, they seem to muddle up and confuse the powers of an unlimited sovereignty with those of a constitutional government, founded on a written organic law. Further on, the argument turns very much on political

necessity; on the obligation to preserve the life of the nation (whatever that may be); on war powers; on the suppression of the rebellion; on the support of the Government, and similar topics. The mischief of such methods of conducting investigations, strictly legal and technical in their nature, is, that in the result, constitutional powers are sure to be measured by private opinions respecting necessity or even policy. By such methods of proof, whatever men desire becomes constitutional.

(3) In the argument now offered to this court, the one simple object will be to ascertain the import and construction of the Constitution, as it exists in the written words which constitute the organic law of the land; and I shall endeavor to test the validity of the act of February, 1862, by its accordance with the letter and spirit of the Constitution as it is, and not as this or that political party may think it ought to be.

The practice of the British Parliament and of other foreign governments can not be adduced as relevant to the constitutional argument; nor, again, can it be considered of importance that the country has been engaged in the suppression of a rebellion of stupendous proportions and crime. In war, the powers of war may be exercised; but the Constitution itself is the same in peace and war. If, to meet some supposed requirement of the moment, courts are to be constrained to give forced and unnatural interpretations—if what is "otherwise unconstitutional" is made lawful because the President, or Congress, or somebody else may deem that material necessities of either war or peace so require—then is our free political system converted into an incarnate despotism; for, as Mr. Jefferson said, there is no difference between a government which can take whatever power it wants and a government with all power.

Government of Enumerated Powers.

(4) It is acknowledged that the Federal Government is one of enumerated powers, and however sovereign it may be within the range of its authority, yet it can not exercise any power which is not expressly or by necessary implication delegated in the Constitution. In testing an act of Congress, the burden of proof is on those who sustain it. The fact that the Constitution may not forbid any particular act does not afford even a presumption that the Government may perform that act, for in terms all powers not delegated are reserved. The power is not prohibited and therefore exists, is not the logic of the Constitution. The power is not granted and therefore does not exist, is the true formula.

No Direct Power over Tender granted to Congress.

(5) The only provision of the Constitution relating in terms to tender is one forbidding the States to make any thing but gold and silver legal tender. This prohibition is in no sense a grant to the General Government, while on the other hand it is a proof that in the distribution of powers, tender would normally fall within State control, else why the prohibition?

Money Power.

(6) But an undefined sort of power, which has been termed the "money power," is sometimes claimed for the General Government. This money power is assumed to involve the right of declaring treasury notes lawful money and legal tender. It is therefore in place to inquire, What power does the Constitution confer over the money of the country? The word *money* is used in that instrument in two senses: Congress may "coin money" and may "borrow money." The word is evidently not used in exactly the same meaning in these two instances. In the latter, the reference is not narrowed to any necessary connection with a circulating medium; but the phrase is to be construed according to common and approved usage of language, and signifies the exchange of the credit of the Government either for money or for other commodities, as well as for services. This *term* money, as used in this sense, needs no further definition here. The borrowing *power*, as connected with the present subject, will be fully considered hereafter.

It is on the coining clause that the friends of a large and vague "money power" build their pretensions.

The Coinage Clause.

(7) The only direct grant of power over money is in Art. I, sec. viii, 5. "To coin money, regulate the value thereof, and of foreign coin."

Respecting the nature and extent of the power thus granted, I shall quote the forcible and conclusive argument of Judge Emott. The term money here, he says, "means, in my judgment, metallic money—gold, silver, and copper, or the metals used for coin—and nothing more. The metals can not without violence be applied to the issue of paper money. To coin money is to make, stamp, and issue coins as money. Coins are pieces of metal, of a particular weight and standard, and to which particular value is given in account and payment. The clause which follows evidently means to authorize the regulation of the value of the coin thus issued, or the money coined; and that this is strictly metallic money appears from the words immediately following, 'and of foreign coin.' The design was to confer upon Congress the power to regulate the value of domestic and foreign coins; and as the domestic money, where regulation is thus conferred upon Congress, is the money whose coinage is authorized by the first part of the clause, the inference is inevitable that this money is simply domestic coin or metallic money. The clause confers upon Congress absolute and exclusive power over the circulating coin of the country, domestic and foreign, by regulating the standard and coinage of the former, and the value in account of the latter."

So also Judge Smith, of the New York Supreme Court, at Rochester, also sustaining the validity of the law, says as follows:

"The money of the Constitution, it seems to me very clear, was to be *hard money—metallic money*. It was to be coined from metals which had an intrinsic value in commerce throughout the civilized world. Nothing else was or is money under the provisions of the Constitution."

(8) To ascertain the force and comprehension of the phrase "to coin money," it is useless to hunt through dictionaries for unusual or figurative or secondary uses of the words. Legal language has no phrase of clearer import. Could doubt, however, exist, a few considerations would settle the matter.

(*a*) At the period of the adoption of the Constitution, "coining money," like its sister phrase, "fixing the standard of weights and measures," had in English law a perfectly unambiguous meaning; both were royal prerogatives, and their conjoinder in one clause indicates that its framers had these prerogatives in mind, and that the power to be vested in Congress was the identical power previously vested in the person of the king. Blackstone fully expounds the nature of the prerogative. It had nothing to do with tender. He doubts whether it even extended to the debasement or enhancement of the coin, and he pronounces an opinion of Sir Matthew Hale in a contrary sense to be opposed to "natural equity." (Chitty's Blackstone, Vol. I, pp. 206 *et seq.*)

(*b*) If the emission of treasury notes is "coining money," then we come to the absurdity that the notes themselves are *coined money*, or *coins!* By the same absurd definition, the *foreign coins*, the value of which Congress may regulate and force into circulation, may consist of Bank of England notes, Turkish shin-plasters, or any like worthless rubbish!

(*c*) The leading nations of Europe are just now arranging the terms of an international *coinage*, to be based on the amount of pure gold in the coins of each country. Of course this arrangement can refer only to metallic money.

Historical Testimony.

(9) For the intent of any statute this Court has sanctioned the doctrine that we may look, if necessary, "to the public history of the times in which it was passed." (Aldridge *vs.* Williams, 3 Howard, 24.) Now, there is no provision of the great organic law that has less need of such an inquiry than the provisions as to coinage. It is clear that in regard to money the people knew what they wanted, and just how to accomplish it. They evidently intended that the lawful money should be coin, and nothing but coin. They therefore gave the Government power to coin money and regulate its value, and also of foreign coin; and they gave no further latitude—not a hair's-breadth. But the object was not yet accomplished. The power of spoiling their work must be taken from the States. The States were accordingly forbidden to coin money, and to make any thing but gold and silver legal tender. By these provisions, and the further rule that all powers not granted are reserved, the work is accomplished, and coin is established as the only legal money of the country as effectually as can be done by a written instrument.

(10) But though we do not need the aid of history to interpret the provisions of the Constitution concerning money, it is eminently satisfactory to find our construction corroborated at all points by the circumstances of the times, the evils under which the country was

suffering, and the future recurrence of which was to be prevented, as well as by the proceedings of the Convention, the published opinions of the men who took part in it, and the tenor of contemporary judicial and legislative action. Every one knows the financial difficulties of the country at the time of the adoption of the Constitution. Two hundred millions of continental currency just turned worthless; separate States with a different coinage, or with different values attached to the same coinage, and with money of account more or less conflicting, variable, and irreconcilable; no circulating medium in which uniform taxes could be assessed, duties paid, or commerce carried on; every-where distress, confusion, chaos—all these mischiefs are forever dissipated by enacting that henceforth coin only shall be money, and under the exclusive control of the General Government.

Nature of Money.

(11) A cursory consideration of the nature of money will fortify the foregoing conclusions.

The office of money is two-fold: it is (*a*) a measure or standard of value, and (*b*) an instrument of exchanges; and nothing can properly be called money which does not discharge these two functions.

(*a*) As a measure of value, it is of the essence of money that it should possess intrinsic value. Money is the universal medium or common standard by which the value of all merchandise may be ascertained. (Story on Con., Vol. II, p. 62.) This definition involves intrinsic value. As well speak of a measure of length or breadth or thickness without these respective attributes, or of a measure of weight without weight, as of a measure of value without value. Furthermore, to fit any particular commodity to serve as money, it must not only possess intrinsic value, but that value should be in the highest possible degree uniform through all time and all over the world. No commodity is perfectly free from fluctuations of value. Even gold and silver have sustained great permanent changes, and are still exposed to similar changes; but, on the whole, no commodities are so little subject to causes of variation; and as commerce must make use of the best instruments that nature affords, even if short of ideal perfection, civilization has found in the precious metals the nearest approach to a perfect standard of value.

(*b*) But a further function of money is to serve as an instrument of exchanges; and it is a remarkable arrangement of Providence that the precious metals, at the same time that they possess over all other commodities the quality of permanent and uniform intrinsic value, should also possess in equal superiority the other qualities that constitute a fitting instrument of exchanges, such as durability, capability of division into convenient portions without loss of value, ductility and capacity of being coined; that is, divided into portions of convenient shape and stamped in token of weight and fineness; even their beauty is worthy of mention; and lastly, their capacity of being reconverted into the shape of bullion with no diminution of value. A gold coin, should it by change of law cease to be legal money, subjects the holder to no loss; it is worth as bullion all it was worth as coin.

(12) Judge Williams is of opinion that the power of Congress in regard to money partakes of the nature of necromancy. His reasoning is in this wise:

(1) The greater value of gold and silver, when coined into money, is not intrinsic, but derived from the "omnipotent fiat" of Congress, in ordaining them to be legal tender. Without this "omnipotent fiat" gold and silver are "inanimate and almost valueless things;" but by virtue of it they acquire a "*magic* and almost incalculable value," and thereby become "precious metals."

(2) But by impressing the same legal tender quality on the Government's own promises to pay, they likewise, confessing the "magic" spell, are transformed and glorified, are vested with the same "magic and incalculable value"—become of "precious value," the analogue of the precious metals.

(3) Therefore the legal tender power, constitutionally considered, is an omnipotent power, inherent in government, of impressing on matter "a new and valuable, but not intrinsic quality," and in a constitutional view it makes no difference whether this miraculous process is performed on metals or paper.

(4) Wherefore Congress can at discretion ordain that either gold coin or paper promises shall be legal tender. Q. E. D.

(5) But furthermore (for even the foregoing *precis* fails to do justice to the force of the argument) during the war the government was in great straits for money to overcome the rebels, and being gifted with a supernatural virtue of imparting incalculable value to a worthless substance, "how shall it be said" that it was not constitutionally authorized to use powers so transcendent and providential?

(For the substance of the above see Printed Record, pp. 37–40.)

Our reply must be less transcendental—indeed we must quote a few very commonplace but well-established principles of political economy, viz:

(1) That the exchangeable value, or purchasing power, of coined money (mere change or tokens to a limited extent excepted) is measured by the value of the bullion of which it consists.

(2) That (excluding monopolies and temporary fluctuations) the value of a commodity, money and bullion included, is the cost of the least amount of labor necessary to procure it.

(3) That the utmost excess in the value of coin over bullion is the cost of coinage, and even this excess, slight as it is, can exist only under certain conditions of the foreign exchanges.

(4) In all countries producing and exporting precious metals (our own included) the normal value of bullion exceeds that of coin, as witness the ordinary price of gold bars in the city of New York.

(5) That the use of the precious metals as money does not augment their value; on the contrary, by stimulating and cheapening production, tends to lessen it.

(6) That a legal tender note has no intrinsic value whatever, either magical or natural. Burn it, and no value is destroyed. The owner has simply changed his relation as a public creditor; what he has lost the public has gained. The nation as a whole is neither poorer nor

richer. But destroy a gold eagle, and intrinsic wealth is gone. The nation is $10 poorer.

(7) "Making notes legal tender adds nothing to their value. You may pay off an old debt with them because the creditor can not help himself; but when you come to buy butter and flour, you find the holders graduate their price to correspond to the new value of the dollar. You find that though Congress may declare notes legal tender, it can not fix the price of provisions." (*Newcomb's Financial Policy*, p. 97.)

With Judge Williams' views of the wonderful powers of government to bewitch values, we concede that it was as much the bounden duty of Congress to exercise its gifts as it used to be of English monarchs to touch for the king's evil.

"This monarch" (says Montesquieu's Persian Traveler, meaning Louis XIV) "is a great magician; his dominion reaches the very minds of his subjects. They think as he wills. With but one million in his treasury, and in need of two, he tells them that one crown is worth double, and they believe. With a big war on hand, and the exchequer empty, he insinuates that a scrap of paper is money, and they are convinced. So great is his power over their minds that he persuades them that he cures all sorts of disease by touching them. (*Montesquieu Lettres Persanes.*)

It is not to be endured that a free and enlightened republic should fall behind any old world despotism.

Distinction between Money and Currency.

(13) Money is not the only instrument by which the exchanges of the world are effected: the other agency is credit. The forms of credit are various: simple book credit, bills of exchange, promissory notes, bank deposits, balances and credits, and checks drawn against them, bank notes, and finally bills of credit, such as the treasury notes in question. All of these economize the use of money, and a large proportion of the transactions of the world are conducted through their means. They are not all equally efficient or convenient as instruments of exchange, and those contrivances, such as bank notes or treasury notes, by which the credit of a bank with large capital, or of a government, is used instead of individual credit, have proved to be excellent substitutes for money. It is often loosely asserted that these paper contrivances are representatives of money, and an argument is even founded or implied, on this ground, that they are in some sense money, and may be so treated by the Government. But the assertion is not true. Treasury notes are not representatives of money. To constitute a representative, the thing represented must exist. The money which treasury notes are said to represent does not exist. In accurate phrase, they are forms of credit, and there is no generic distinction between them and other forms of credit. They may be said to represent credit.

Now, the various means by which purchases are made in any community, and transactions performed, are properly called, in the aggregate, the currency or circulating medium. The currency, therefore, is composed of two parts, viz: 1st, money; and 2d, credit, in the form of bank notes, treasury notes, checks, bills of exchange, etc.

This distinction between currency and money is important, there being great confusion of ideas prevalent on this subject, even in some judicial minds.

Treasury Notes not Money.

(14) The act of Congress of February, 1862, declares the treasury notes therein authorized to be "lawful money." I have just endeavored to show that they are not money, but forms or representations of Government credit. They are mere evidences of debt, like promissory notes or bills of exchange, the Government being debtor to the holder for the amount. When money is transferred in satisfaction of debt, not only is the debt canceled as between the parties, but it is absolutely *paid*. The creditor receives in hand the actual amount of his claims. But when a treasury note is transferred, the process merely substitutes the Government as the debtor. The creditor is still unpaid. The notes promise on their face to pay money. A promise is not the same as the thing promised. If it were, then the Government could pay in a second slip of paper printed in the same form, and this latter again with another, so that it in fact never promises to pay any thing, beyond swapping one slip of paper for another exactly similar. This absurdity has sometimes been too much even for those who maintain the validity of the act. "Most clearly," says Judge Johnson, "they are not money. Upon their faces they only promise to pay money."

If not money, still more clearly they are not *lawful* money; and if not lawful money, there is no error in the judgment of the Kentucky Court of Appeals.

Fallacy about Money.

(15) I will here, as an appropriate place, very briefly advert to a confusion of ideas prevailing in some of the discussions of this subject. The error may be put in this form:

The Constitution gives Congress full power over the coined money of the country. (Which is clearly true.)

Coined money is currency. (Which is also true.)

Therefore Congress has full power over the currency of the country. (Which conclusion is *not* true.)

And thence comes the further deduction, that whatever Congress may do with the coined money, it may do with treasury notes, which are currency. The fallacy is evident. The conclusion is more comprehensive than the premises warrant. Limit it, so that it will read: Therefore Congress has full power over the currency of the country, *so far as it is composed of coined money*, and the syllogism is perfect. It is not logical to infer a general power over the whole currency from a special grant of power over a portion of it. On the contrary, the logical inference lies the other way.

Coined Money ipso facto Tender.

(16) The power delegated to Congress to regulate the value of foreign and domestic coins undoubtedly constitutes the money thus regulated

the legal money of the country, and the standard of value for measuring the performance of all contracts in which money is concerned. Such coined money is legal tender *propria vi*, of its own force, and needs no State or Federal legislation to make it so. To regulate the value of coined money is to fix the value for which it is to be received in transactions as well as in the discharge of obligations. As in the performance of a contract calling for wheat or potatoes, wheat or potatoes are valid tender, without any legislative declaration whatever, so in a contract calling for money in terms of dollars, dollars coined by the United States, and their value regulated in virtue of its constitutional prerogative, are legal tender. The declaration in the act that such coins are legal tender is surplusage; they are equally so without or with it.

Base Coinage.

(17) Judge Williams controverts the foregoing proposition. (*Printed Record*, p. 28.) The coinage power, he says, is not restricted to gold or silver, and in fact lawful money is coined of copper and nickel.

Now, if these coins of base metal are legal tender *propria vi*, they are so without limit, and "perverse debtors" may destroy their creditors' debt by payment in these valueless tokens, although Congress may have declared that they shall not be legal tender.

Answer.

(18) (1) Granting the argument, it is not pertinent. If base coins are legal tender, whether with or without limit, they are so by virtue of an express grant of coinage power to Congress. But no such express grant of power is alleged in the case of greenbacks. *Ergo nihil probatur.*

(2.) But the argument is fallacious. Congress can "regulate the value" of both foreign and domestic coins—that is to say, can declare on what terms, at what rates, within what limits, they shall pass in payments and accounts.

(3) Our proposition is not that coins become legal tender merely when coined, but only when and as their value is regulated or declared. If Congress limits or conditions their value, their legal quality is affected accordingly, though it might be a question whether, in the case of gold and silver coins, any State might not waive such limitations within its own jurisdiction.

Silence of the Constitution about Tender.

(19) Some jurists (and notably Judge Williams, *Printed Record*, pp. 28–9) have attempted to infer a power in Congress over tender from the fact that the Constitution is silent on the subject! The Constitution, says Judge Williams, nowhere declares what shall be legal tender, but "leaves" it among "the numerous subjects of legislation." This latter phrase is used repeatedly, and with stress. The basis of the argument seems to be on a theory that there exists in the General Government a grand *depositum* of powers and functions, which belong to Congress unless prohibited. Reduced to terms, his argument, if we understand it, runs thus:

(1) The silence of the Constitution on a subject matter "leaves it among the subjects of legislation."

(2) "Leaving it among the subjects of legislation" gives Congress the power to legislate on it.

(3) Therefore, the Constitution being silent about tender, Congress may legislate on it at will.

In other words, it was the purpose of the framers of the Constitution to confer on Congress unlimited power over tender, and, although ten words would have accomplished their purpose directly, and without possibility of doubt or misinterpretation, it pleased them to invent an intricate and indirect procedure, by which they might confer the power while seeming to withhold it. All plausible enough, assuming the Convention were all idiots.

The original vice tainting all arguments to justify the legal tender power directly from the Constitution is, that they are all compelled to assume, in face of the contrary provision, that the absence of prohibition is equivalent to a positive grant. None dare to put the proposition into terms, but they hint it, or slyly assume it under disguise or indirection—"left to legislation," says Judge Williams.

No power over Tender directly granted to Congress.

(20) The difference between the provision regarding coinage and the provision regarding tender is not unimportant. It is shown in the following parallel:

Coining Money,	*Power over Tender,*
(1) Is forbidden to the States.	(1) Is forbidden to the States.
(2) Is granted to the U. S.	(2) Is NOT granted to the U. S.

So far, therefore, as a direct grant is concerned, neither can make any thing but gold and silver a legal tender. The States can not, because it is expressly forbidden; the United States can not, because it is not expressly granted.

Unless, therefore, the power to make treasury notes a legal tender can be shown to be necessary and proper to the exercise of some power that is expressly granted, it must follow that the act in question is invalid and unconstitutional.

Practical Construction of the Constitution.

(21) Judge Williams (*Printed Record*, p. 31) declares that Congress has "claimed and exercised unlimited power over legal tender," and that "the seeming acquiescence without challenge by all departments of the Government, the profession, and the people, from the earliest history of the Constitution down to the act of February 25, 1862, is a strong proof of its existence," and that this rule of construction has been recognized by the Supreme Court. To which we reply:

(1) His own citations prove that the power claimed and exercised by Congress without challenge, so far from being "unlimited," was in every case strictly limited to domestic or foreign coins.

(2) The act of '62 has been, from the beginning, challenged as

invalid over and over again, in and out of Congress, by the profession, before the courts.

(3) The Supreme Court has never sanctioned a rule of construction that the unchallenged exercise of a certain power is evidence of the existence of a different power, never before claimed or exercised.

The emergencies of the Government, both at the beginning and often since, in peace and war, have been very pressing. It has sought relief in treasury notes; but, till now, never made or tried to make them legal tender; so that the practical construction of the Constitution has been emphatically against the existence of the power.

Faith of Contracts.

(22) The foregoing closes our argument that the Constitution gives no direct authority to make paper legal tender. Before proceeding to the investigation whether such authority is given by implication, two questions require consideration:

I. Does the act of 1862 impair the faith of contracts in this case?

II. If it does impair, is it for that reason unconstitutional?

I. *Does the Act impair the Faith of the Contracts in this Case?*

(23) The note in this case was made in 1860, and was payable in 1861, and the makers therein undertake to pay to the defendant in error a given number of dollars. Now, this contract must either (1) be performed by the payment of the dollars called for, or (2) must be discharged by some law capable of dispensing with such performance. The contract calls for dollars; what then is a dollar?

What is a Dollar?

(24) Fortunately this term admits of no doubt. Congress, in the exercise of its unquestioned power to regulate the value of coined money, provides an answer. A dollar is a coin struck by authority of the Government, and containing a given quantity of gold or silver. At the date of the contract, nothing else was known in law as a dollar—nothing else is known in law NOW. The quantity of pure silver in the silver dollar remains as it was originally established by the law of 1793; the quantity of pure gold in the gold dollar has been slightly varied, solely to adapt it to the altered ratio of the value of the metals, in order to keep the gold dollar and the silver dollar of equal value.

With this qualification, the Government has made no change in the value, or the character, or the constitution, or the material, or the nature, or the properties, or the denomination of the dollar.

Lex loci contractus. Moreover, the contract was made in Kentucky, in which State, in both 1860 and 1861, nothing but gold or silver coin could be lawfully tendered in payment of debts. Says the Court of Appeals of that State:

"The construction and obligation of the contract must be determined by the law as it then existed (*i. e.*, at the date of the contract). Under that law, the court often and invariably decided that a contract to pay a specified sum in dollars necessarily meant gold or silver dollars." (Johnson's adm'rs *vs.* Vickers, 1 Duval, 267.)

The meaning of the contract and the method of performance being thus authoritatively fixed, it is useless to inquire further what the parties to this contract meant when they used the term dollars. In the absence of written evidence to the contrary, the law controls the definition. It must be held that the makers of the notes promised to pay the specified amounts of the gold or silver coins of the realm, which alone, then as now, is what the law recognizes as dollars.

Such being the only meaning of the term dollar known to the law of the United States or of Kentucky, it is hardly necessary to dwell on the proposition that treasury notes are not dollars. Whether it is competent or otherwise for Congress to direct dollars to be made of paper, or to pronounce a promise to pay a dollar *to be* a dollar, or a promise to pay one thousand dollars *to be* one thousand dollars, it is sufficient for our present purpose that in fact Congress has not done so. It would be the same as to declare a written promise to pay potatoes *to be* itself the potatoes promised, or a Chicago warehouse receipt for wheat *to be* the very wheat receipted for.

To require us, therefore, to receive as dollars these treasury notes, which are not dollars by the laws of the United States or of Kentucky, is clearly a violation of the obligation of the contract.

Judge Emott's Argument.

(25) But an argument in an opposite sense is forcibly stated by Judge Emott, of the New York Court of Errors.

"This act of Congress can not be successfully impeached for impairing the contracts between debtors and creditors to which it may apply. The contract of the obligor in this bond was simply to pay the amount stipulated as so many dollars in the lawful money of the country; that is, in that which should be its lawful money when such contract was due. It was not either in terms or effect a contract for the delivery or return of so much gold or silver, except as that was involved in the idea of the payment of the debt, while gold was the only medium in which debts could be paid. * * (*a*) But it is no part of a contract of debt made at one time for the re-payment of money at another, that this representative or instrument should possess the same exchangeable value or the same purchasing power as at the time of incurring the debt. All that the debtor contracts to do is to return to his creditor in dollars and cents so much as he has received, and the advance and re-payment are alike to be made in that which, by competent and valid authority, is made the medium of account and payment."

Preliminary to a Reply.

(26) In reply, by way of clearing the field, two preliminary observations: (1) We concur with the proposition in paragraph (*a*). The exchangeable value of the money to be paid makes no figure in the case. A contract to pay either dollars or wheat is performed by tendering dollars or wheat, no matter what the market value. (2) What we have to say will apply only to contracts before the passage of the act. In subsequent ones it may be reasonable to infer that parties acted in view of its provisions, and to construe them accordingly.

Reply to the Argument.

(27) Judge Emott's argument, in substance, is meant to convey the following proposition, viz: Any contract, in terms of dollars, may be satisfied by the tender of whatever may be declared to be dollars by competent authority, at the time of performance. A proposition of vast importance; but, even if correct, it does not show that such a contract can be satisfied by the tender of treasury notes, inasmuch as treasury notes are not declared to be dollars by any competent authority. The act assumes to do a very different thing, viz: to make them legal tender; but neither singly nor collectively are they termed dollars or issued as dollars. The words printed on their face denote that the United States will *pay* one dollar, or five dollars, or one hundred dollars; not that the paper itself *is* one dollar, or five dollars, or one hundred dollars.

The Construction of Contracts.

(28) The general rule requires that a contract shall be construed in the sense as understood by the parties. If the meaning of words undergoes change between the times of execution and performance, the former will control and overrule the latter. Is there any reason of justice, or public policy, why a different rule should prevail in the interpretation of an obligation to pay dollars? This is not any question of the power of Congress to regulate the value of coined money. If Congress should declare a copper cent to be a dollar, the term dollar, in all contracts thereafter made, would unquestionably, by presumption of law, mean a copper cent, and nothing more. But as unquestionably by the same presumption of law, in case of contracts previously made, it would mean a given amount of pure gold; and such contracts can not be satisfied except by the performance on the part of the obligor of what he agreed to perform as understood by the parties.

If Congress should declare copper cents to be dollars, can it be pretended that six copper cents would constitute payment of a year's interest on a 6 per cent. $100 United States bond? I speak not of repudiation, but of payment. Were the holder compelled to receive them—say by some such law as the act of 1862—would the debt be extinguished, or its binding force released, or its moral obligation satisfied? Can the debtor say that what he promised to pay, and what the creditor consented to receive, was not any sum in particular, but whatever he might himself choose to declare to be dollars at the time of payment—in other words, whatever he might himself choose to tender? Who ever heard of capitalists loaning their money on so imaginary a consideration, thinner than the fabric of a vision—advancing solid values to be repaid in the "deceptions and incantations of words?" Or again, can Congress, by declaring a copper cent to be a dollar, lawfully circumvent the provision that the compensation of Federal judges shall not be diminished during their term of office? The proposition is self-refuting.

Now, reverse the hypothesis. Instead of the copper cent, let Congress declare the gold eagle to be a dollar. Would any court in

Christendom be guilty of the supreme injustice of decreeing that the debtor should pay ten times his contract, on the ground that by competent valid authority the eagle had been declared to be of the value of a dollar in account and payment, and that his contract was to pay whatever should by such authority be so decreed? The proposition will not stand the test of common sense. But there is not one law for the debtor and another law for the creditor.

Again, the power of Congress over weights and measures is as absolute as over the value of coined money. In its discretion it has not thought expedient to exercise this power, but holds it in abeyance. When exercised, a pound, a yard, an acre, will be in law whatever Congress shall make them, and subsequent contracts must be construed accordingly. But let us suppose, for instance, the extent of a legal acre to be doubled by Congress. A pre-existing contract calling for acres would nevertheless be surely interpreted in accordance with the meaning of the acre as understood at the time. Men contract for things, not words; realities, not signs. Said John Locke: "Men in their bargains contract not for denominations or sounds, but for the *intrinsic value*." Yet Judge Emott's argument would apply exactly, *mutatis mutandis*, to a contract for pounds or bushels or acres. The agreement of the obligor, he might say, is to furnish whatever at the time of performance is by competent and valid authority declared to be pounds, bushels, or acres.*

II. *Can Congress violate Contracts?*

(29) We think we have proved that the act of '62, in forcing us to receive greenbacks in payment of our debt, impairs the sanctity of contracts. The question follows: If it does impair, is it therefore unconstitutional? No, say its defenders, for Congress is not forbidden to impair the obligation of contracts. In reply to which we ask, But where is it granted? The argument reverts to the old formula: Does the prohibition of a power to a State imply the concession of that power to Congress? If so, why was it not operative in the case of letters of marque and reprisal, and of coining money? They are forbidden to the States; why a special grant to Congress if the prohibition is itself a grant? But the short of the matter is, that Amendment X decides the controversy.

(30) Furthermore: in the case of an ordinary statute, the preamble is to be held as an authoritative exponent of its purpose and a guide to

* Five cases in a contrary sense are quoted by Judge Williams—none of them pertinent. Two are very old cases of coined money under English law, interpreted in the light of the royal prerogative. Two others are Virginia decisions, properly deciding that in case of a contract payable in "Virginia currency," payment is to be made in such currency as was current in Virginia at the time of payment. The last case is United States *vs.* Robertson, 5 Peters, 644, in which some twenty questions were certified to the Supreme Court for their opinion. No relevancy to our present subject is evident in any of them. The nearest approach thereto seems to be this: The Bank of Somerset having failed, the United States (being a creditor) attached certain debts due the bank. The debtors claimed the right to pay in the broken notes of the bank. The Court allowed this claim so for as the debtors held the notes at the time of the transfer of the debts to the United States; and with regard to the excess remaining due the Court, being divided, gave no opinion as to the paper or money in which it should be paid.

its construction. How much more so in the case of so solemn and deliberate an instrument as our organic law. "We, the people of the United States, in order to establish justice, do ordain," etc. Is the violation of the sanctity of contracts a mode of establishing justice? The Constitution answers for itself, when it forbids the States to commit such injustice. Our opponents have to hold in substance the iniquitous theory, that the Constitution forbids this kind of bad faith to the States only to secure a monopoly of the same to the Federal Government—that as citizens of Kentucky we must perform our promises, but that as citizens of the United States we may violate them.

The Bankrupt Law.

(31) But the trump card of our opponents in this connection is the bankrupt laws. Bankrupt laws, they say, have been enacted by Congress, the effect of which is to impair the obligation of contracts, and relieve the bankrupt of his debt against the will of the creditor, and such laws have been held constitutional both by the Supreme Court of the United States and by State courts. As such effects form no valid objection to general bankrupt laws, they form no valid objection to the legal tender act. If Congress can do these things in the one case, why not in the other?

Reduce the argument to a syllogism:

(1) Congress may enact general bankrupt laws.

(2) But general bankrupt laws impair the obligations of contracts.

(3) Therefore Congress may impair, etc.

The fallacy is old and hackneyed. The conclusion is too comprehensive for the premises. The logical conclusion is, Therefore Congress may, *by a general bankrupt law*, impair, etc.; which, for present purposes, proves nothing.

The matter lies in a nut-shell. Bankrupt laws are part of the approved legislation of some of the most civilized states, and are held beneficial by many jurists and practical men. But, as they do in some cases impair the obligations of contracts, the States are in effect deprived of the power to enact them. To remedy evils that might ensue if that power did not exist somewhere, it is bestowed by special grant on Congress, for weighty reasons the most suitable depositary. *Expressio unius, exclusio alterius.* The special grant disproves the intention to bestow any larger power.

The analogy of the bankrupt laws being thus out of the way, and no other direct constitutional authority being alleged, our path is clear to the conclusion that the violation of the faith of contracts is, in this case, a violation of the Constitution.

Does the Tender Power exist by Implication?

(32) There being no direct authority granted in the Constitution to make any kind of paper legal tender, the question arises whether it may be inferred from any of the express powers. For this purpose I propose to consider *seriatim* such of them as are relevant to this inquiry.

The Borrowing Power and Bills of Credit.

(33) Among the powers expressly delegated to Congress is the power to "borrow money," and it is mainly as being necessary and proper to the exercise of this power that the right to declare treasury notes legal tender is maintained by its ablest advocates.

I do not intend here to argue either for or against the power of Congress to emit bills of credit, by which name these issues are known in the Constitution. There can be little doubt that it was not the intention to grant such a power. The Convention, after much deliberation, struck it out from the original draft. All evidences, internal and circumstantial, lead to the conviction that the Constitution knows no currency but hard money.

Still, as a skillful lawyer, it is said, can drive a coach and six through the best constructed statute, so may a legislature through its organic law; and while Congress can borrow money, and issue its securities therefor, I do not see that it may not issue them in such shapes, printed or engraved or written, and in such denominations, bearing interest or otherwise, with or without coupons, and with such devices, and with backs either green or red or parti-colored, as it may elect; and if the people choose to receive them, and to convert them into a medium of exchanges, who can say them nay?

But to infer from the borrowing power the power of emitting bills of credit, and from this latter again to infer the power of making them legal tender, is to double inferences, and to pile incident upon incident to the utter destruction of all limitation of power in the General Government.

Issuing Money not Borrowing.

(34) Some arguers, holding treasury notes to be "lawful money," and at the same time seeking authority for their issue in the power "to borrow money," find themselves in a most prodigious muddle. Even Judge Emott has not kept out of this perplexity. His acute mind appreciates the solecism of saying that Congress may emit money as a means of borrowing money. He gets out of the difficulty by changing the terms of his proposition. "There is no contradiction," he states, "in the idea of borrowing money by issuing paper currency." This is true; but it is furthermore true—what he does *not* state—that the escape from the solecism by the change of the term money into currency, proves that the currency in question is *not money*. It is only because treasury notes are not money, but only a form of the public credit, just as much as 5-20's or the 6's of '81, that they fall within the scope of the borrowing power.

Besides, borrowing implies a *lender;* but if greenbacks are money, the party who gives his iron or flour in exchange for them is actually *paid* for his commodity, and there is neither borrowing nor lending in the transaction, but mere purchase and sale.

The Sumner Doctrine.

(35) Can Congress, issuing treasury notes as a means of borrowing money, make such notes a legal tender for debts from citizen to citizen?

The argument was enunciated in the United States Senate by Mr. Sumner, in the following terms:

"It is difficult to escape the conclusion that if Congress is empowered to issue treasury notes, it may affix to these notes such character as shall seem just and proper, declaring the conditions of their circulation and the dues for which they shall be received. Grant the first power, and the rest must follow."

As these words have been quoted and sanctioned in more than one judicial opinion, I may, without any disrespect, for the sake of easy reference, term the proposition embodied in them the Sumner doctrine.

The application of the Sumner doctrine to the present question is thus: assuming the authority to issue treasury notes as a means of borrowing money, Congress, to increase their circulation and credit, may give them any character it pleases; and having thought proper to give them the character of legal tender, such character is constitutional and valid. This is a startling doctrine.

Applications of the Sumner Doctrine.

(36) It is easy to imagine other characters which Congress might have thought proper, or may yet think proper, to affix to these emissions, and which would tend most powerfully to give them credit and circulation. They might be invested, for instance, with the character of an execution, to be levied at the holder's will on any property, real or personal, with power to sell, with or without notice, the proceeds of the sale to go to the holder. If it were said that such a provision would be unconstitutional, as depriving a person of his property without process of law, so is the creditor deprived of his property who is forced to receive paper, worth sixty cents on the dollar, in satisfaction of his debt. Or it might be argued that the levying of the execution was itself a process of law, like a summary sale of land for taxes. It might be enacted that the mere possession of a treasury note of a given amount should have the force of a free pass on railroads, steamboats, and other conveyances; or should entitle the holder to free entertainment at hotels; to free entrance to theaters, with choice of seats; to the gratuitous use of pews in churches. All these come within both the letter and the spirit of the Sumner doctrine.

It would doubtless make these notes very much sought after by many persons, if the possession of a given amount, say a thousand dollars, by a married person should have the character of a decree of divorce from husband or wife, or should make the holder the husband or wife of any other unmarried person, or should give the holder the right to exercise the office of magistrate, or serve as a medical diploma, or give him the right to preach in churches, or entitle him to a vote at elections.

According to the Sumner doctrine, Congress may give all these characters to its treasury notes, provided (1) you grant the power to issue them, and (2) the legislature should think that such characters would give them credit and circulation.

Maculloh vs. *Maryland.*

(37) This being the nature and extent of the character which it is claimed that Congress, in virtue of the borrowing power, may affix to

treasury notes, we have now to examine the arguments adduced to sustain so extraordinary a claim. The case of Maculloh *vs.* Maryland, is the great reliance for its support. But the authority adduced from this decision in favor of the law under consideration is not based on the analogy of the issue, but rather on certain *dicta* uttered by the court as general rules of interpretation in respect to implied powers. In the words of the Chief Justice:

"Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

To ascertain the import of this canon of interpretation, reference should be had to the question under consideration. That question was, whether Congress had power to create a corporation as an agent for transacting the fiscal business of the Government; and the court decided in the affirmative.

Now, observe the absence of analogy between the point then in controversy and the present legal tender question. Then it was simply whether the Government could organize and use a convenient machinery by means of which to perform its necessary functions—this machinery being of a subsidiary character, like the sub-treasury of later times, and in nowise clashing with the rights of States or individuals. The present question, on the contrary, involves the highest exercise of sovereign power. The principles of constitutional construction derived from the one case demand the most cautious and exact treatment when we apply them to the other.

In Maculloh *vs.* Maryland the question was whether the Government might create a bank for fiscal purposes. No such question arises in the present case. The machinery Congress has thought proper to employ as a means of borrowing money is the use of bills of credit. No question is here raised of its competency to employ bills of credit as a means of borrowing money. The question that is raised here is whether Congress can affix to its bills of credit whatever character it pleases for the purpose of giving them credit and circulation. No analogous question came before the court in the case of Maculloh *vs.* Maryland.

To render the case of Maculloh *vs.* Maryland parallel to the present we must suppose the question to be, not the comparatively unimportant one whether Congress could incorporate a bank as a fiscal agent, but, postulating such power, whether it could affix to such bank any character which in its opinion might promote its efficiency and success. For instance, a monopoly of the exchange and banking business of the country would have enabled the bank to transfer the money of the Government from point to point with great promptness and economy. The possession of such a monopoly would have caused its stock to be highly esteemed, and to bring a high price, and men of wealth and character and financial skill would have deemed it an honor to be connected with it, and would have eagerly sought to act as directors and officers; or its stock or issues might have been made legal tender, or the discrediting of its notes might have been declared criminal, and punished as treason;

all of which "characters" would have very powerfully assisted the usefulness of the bank as the fiscal agent of the Government. But would Congress therefore have had the right to endow the bank with all such monopolies and characters? Certainly there is nothing in Maculloh *vs.* Maryland to countenance such a proposition. The parallelism or analogy of that case to the present one is therefore entirely absent.

State Taxation of Federal Securities.

(38) It is necessary to notice the support sought for the legal tender act from the doctrine established in Maculloh *vs.* Maryland, and more notably in Weston *vs.* City of Charleston (2 Peters, 449), as well as in some recent cases, that bonds or stocks issued by the United States are exempt from taxation by the States.

"Such legislation," says Judge Emott, meaning the exemption just mentioned, "rests wholly upon a power implied from the propriety or advantage of conferring such attributes on Federal evidences of debt, in order to aid the Federal Government in borrowing money." And his further inference is that, inasmuch as Congress can confer on the Federal evidences of debt the "attribute" of immunity from taxation, it may also confer the attribute of legal tender; in short, if it can confer any one attribute, it can any other.

But there is nothing in Maculloh *vs.* Maryland to justify the inference. The gist of the decision (as regards taxation) is simply in restraint of the power of the States, by taxation or otherwise, "to retard, impede, burden, or in any manner control the operations of any constitutional laws enacted by Congress to carry into execution the powers vested in the General Government." There is nothing here about conferring attributes, but a mere assertion of the power of the General Government to protect what it had a right to create. In Weston *vs.* City of Charleston (2 Peters), and in the recent cases, the same principle was extended to United States stocks, whether *eo nomine* or as part of the capital stock of banks. "If the right to tax exists in the State, no matter in what shape, it is a right which in its nature acknowledges no limit," and might be so exercised as to annihilate the ability of the Federal Government to borrow. The tax itself being therefore in derogation of its rightful powers is unconstitutional.

The decision in these tax cases is merely a corollary from the doctrines of the Chief Justice in the great bank case, that the Government may protect its constitutional functions from hostile State legislation.

Difference from Present Case.

(39) No such question is involved here. The State of Kentucky has not attempted, by tax or otherwise, to impede any action of Congress. It is possible to construct an imaginary case to which the principles of Maculloh *vs.* Maryland might apply. This, for instance, if it were attempted to prevent the receiving and paying out of United States Treasury Notes on the ground that the circulation of foreign currency is prohibited by the laws of Kentucky, such an attempt would probably fall within the purview of the Maryland decision; provided,

that is, the emission of bills of credit is a rightful exercise of the power of borrowing money.

Great Substantive Powers can not be Implied.

(40) But, furthermore, the words of Chief Justice Marshall are at variance with the inferences they are employed to sustain.

And, first, as modifying and explaining the sense in which the words are to be taken, I quote another passage from the same decision: "The power of creating a corporation, though appertaining to sovereignty, is not like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which can not be implied as incidental to other powers, or used as a means of executing them." Here the broad ground is laid down that great substantive and independent powers can not be implied as incidental to other powers, or used as a means of executing them. Thus, although Congress is authorized to carry on war, maintain armies, and do other things requiring money; and although money can not be procured without taxation, for taxation is even the ultimate basis of borrowing, yet the Supreme Court gives its solemn decision that not even for these indispensable purposes could Congress impose taxes without express authority, because taxation is a great substantive and independent power, and as such can not be held to exist by implication.

Legal Tender Power is a great Substantive Power.

(41) But the power of controlling tender is a great substantive and independent function of the supreme authority, and forms an integral department of the law of contracts by which the industry and well-being of communities are regulated. The authority that can issue unlimited paper, and make it legal tender, is an authority that can overrule State and private rights, interfere in the transactions of man with man, set property flying at random from hand to hand, rob the widow and orphan of the fund provided for them by affection or charity, legalize the dishonesty of trustees and guardians, destroy all measure of value, annihilate the accumulations of labor, paralyze the vitality of enterprise, transfer without consideration the savings of prudence and economy to the hands of sloth and prodigality, transmute industry into speculation, and destroy all the foundations of honesty and morals.

Indeed, a favorite argument in favor of the law, much insisted on by its friends, consists in the fact that the power to make money of paper is an inherent attribute of sovereignty, and therefore existing in the Federal Government as the sovereign. We accept the argument as to the nature of the power, but the sovereign in whose bosom it rests is the people, who have thought proper to keep it to themselves.

Such a power, if it exists at all, must exist, says the Supreme Court, by direct grant, and not by mere implication.

Analysis of the Legal Tender Power.

(42) The foregoing point is so important that I shall try to fortify it by an analysis of the legal tender power as applied by the act of 1862 to contracts made previous to its passage.

(1) The act releases the debtor from his contract without performance.

(2) It deprives the creditor of his property without compensation.

(3) It substitutes, against the creditor's will, the Government as his debtor, in place of the party with whom he contracted.

(4) It does not bind the Government, thus substituted as debtor, to pay the debt at any particular time, at any particular place, or in any particular value.

(5) It claims for Congress the power to annihilate all debt, for they may make tender of a blank slip of paper, or a dry leaf of the forest; indeed, Congress has been urged to emit an additional billion of dollars in order to alleviate the burden of public and private debt by its depreciation.

(6) It amends the Constitution by asserting for Congress a power to emit bills of credit, and "to regulate the value thereof."

(7) Its operation (*in invitum*) is to confiscate all existing debts or money claims, common or fiduciary.

On this point of confiscation note the identity of this law with the attempt on the part of the usurping Confederate Government to confiscate debts due from southern debtors to northern creditors.

(*a*) In both cases the debtor is discharged and the creditor forever barred.

(*b*) In both the Government (the U. S. in one case, the bogus C. S. in the other) substitutes itself as creditor by force of law.

(*c*) In both the plundered creditor receives for his claim a mendacious document: in the one case called a treasury note, on which is printed a promise that does not even profess to be redeemed; in the other case, I know not what sort of worthless certificate, promising indemnity about the time of the Greek Calends.

Now, after these points of identity, notice some points of difference:

(*a*) The bogus government tried to rob only those whom it considered its enemies; the lawful government, its friends.

(*b*) The incidence of southern confiscation was direct. Pay me, said they to the debtor, and we will hold you harmless. The money taken out of the debtor's pocket went into their own. For justification they appealed to the laws of war. They had to get money, and could not afford to be too honest. But on our side the business is disguised, and refined terms are used—"convey the wise it call." We do not steal commodities or labor, but we induce A to supply them by giving him the power to rob any B to whom he may happen to be indebted; and all this not for our own benefit, for the prices paid to A for his pork or his shoddy are in proportion to the depreciation of the paper. Oriental despotisms, when they farm out the right to plunder their subjects, take a fair share of the booty. We are not so wise. The creditor's loss inures to the contractor, who has already received two or three prices for his goods.

"Legal tender for all debts" is a phrase of unpretending and innocent aspect, but of substantive and independent power, not inferior to the power of taxation.

Analogy of the Constitution.

(43) This view is directly sanctioned by the text of the Constitution. The power of coining money, and the power of declaring what shall be legal tender, are equally attributes of sovereign authority; but in substantive and relative importance the former is far inferior to the latter. The coining power is merely the power of stamping the precious metals and declaring their value in account; but yet, to vest it in Congress, the framers of the Constitution found it necessary to make an express grant, and at the same time forbid it to the States. Had they intended therefore to place the legal tender power in the same hands, much more would a direct delegation of power have been necessary.

Legal Tender Power inconsistent with the Constitution.

(44) Referring further to the words of Chief Justice Marshall in Maculloh *vs.* Maryland, it is seen that he declares that to make any *means* constitutional, they must "consist with the letter and spirit of the Constitution." I shall attempt to show that the act of Congress of February 25, 1862, when applied to previous contracts, consists with neither.

(*a*) The act does not consist with the spirit of the Constitution in the nature of the currency which it proposes to establish. Almost all commentators acknowledge that ours was meant to be a hard money government. Says Judge Smith, of the New York Supreme Court, in his decision sustaining the act:

"These two provisions—viz: the clause conferring the coining power on Congress, and that forbidding the same power to the States, as well as to make any thing but gold or silver a legal tender—these two provisions most conclusively show, I think, that it was the purpose of the framers of the Constitution to give to the National Government exclusive control of the currency of the country, and secure thereby *one* currency for the whole country—one national, uniform currency. But that currency most evidently was to be *a metallic one.* The money of the Constitution, it seems to me, was to be *hard money—metallic money.* The language of these two provisions is too explicit, it seems to me, to admit of any other construction. But the contemporaneous history and construction of these two provisions confirm this view."

(*b*) The act does not consist with the spirit of the Constitution, inasmuch as it interferes with rights reserved to the States. The 10th amendment of the Constitution is as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This provision incorporates into the Constitution of the United States, and throws its ægis around all those parts of the constitution and laws of the separate States, that concern powers not granted to the General Government or prohibited to the States. It effects in a short sentence all that could have been effected by an exhaustive enunciation and a grant in terms of the powers in question. It follows that Congress has no more absolute right to make war, or the President no more absolute right to command the army, than the States have to regulate the law of contracts. The title of the General Government to the exercise of

its delegated functions is supreme; the title of the States to the exercise of their reserved functions is equally supreme. Both rest on the same foundation—the will of the people expressed in the organic law—and an invasion of the smallest right which the people have thought proper to reserve is as much an infraction of the Federal Constitution as an attempt to overthrow the Supreme Court or to constitute a dictator.

So thoroughly does the spirit of respect for the reserved rights pervade the Constitution, that even in the case of forts and arsenals, and similar places, so necessary for the defense of the nation, Congress can not, without their consent, deprive the States of the power of legislation over such as may lie in their limits.

Now, among the subjects which the people have neither granted to the United States nor forbidden to the States is the whole law of contracts, with all their rights and remedies, as between citizen and citizen, with the exception of a single limitation of the power of the States over tender. This whole law of contracts is therefore by the Constitution, with the above exception, placed within the State jurisdiction. This is proved by the very exception above mentioned. The provision that the States should not make any thing but gold or silver lawful tender implies that legislation on tender lies within their province. But for this provision Kentucky could make bank notes or tobacco or greenbacks lawful tender.

Therefore, inasmuch as the act in question undertakes to legislate on this subject of tender, it is clearly at variance with that provision of the Constitution which places the law of contracts under State authority.

(*c*) The act does not consist with either the spirit or letter of the Constitution, inasmuch as it assumes to enable States to make paper a legal tender.

There are three ways in which a State may infringe this injunction:

(1) By a provision in its Constitution; (2) by statute; (3) by judicial decree. All three are alike prohibited and void. The people in their organic action, the legislature, and the courts are concluded by the supreme law.

The constitutional provision may be distributed thus:

1. No State Constitution shall allow
2. No State Legislature shall enact
3. No State Court shall decree

} any thing to be tender but gold or silver coin.

It would be, for instance, grossly unconstitutional for the Legislature of Kentucky to enact greenbacks to be legal tender. This is not a power which, otherwise prohibited, may yet, like laying a tunnage duty, be exercised by consent of Congress.

It was equally unconstitutional for the Louisville Chancery Court to decree, and thereby make them legal tender, *in invitum;* the decree was void, and the Court of Appeals could not but reverse it.

The only reply to the above is a verbal juggle about the verb "*make,*" and runs after this wise: "It is Congress that makes the notes

tender, not the Court. The Court only notices and enforces the legislation of Congress." Well, after all and nevertheless, in noticing and enforcing that legislation, it still does, by its decree, "make" the notes legal tender—the precise mischief the Constitution forbids.

And here lies the gist of the whole argument; what is the mischief which the Constitution intended to prevent? The words are simply prohibitory, but they mean something; they were ordained, not at random, but to effect some positive purpose.

Now, two hypotheses, and no more, exhaust the subject. It was intended either,

First, To confer on the General Government sole control over tender by forbidding State participation; or,

Secondly, To provide that, throughout the Union, no creditor should ever be compelled to receive any thing but gold or silver in payment of any debt due to him.

But the first hypothesis is untenable, inasmuch as the clause is restrictive, and therefore confers no authority whatsoever. It is true that if express power over tender were elsewhere granted, this clause would make it exclusive—as in the case of coining money—but of itself it grants nothing, and is not in any part and word to be so interpreted.

The *first* hypothesis failing, the *second* is established, and the word "make" must be interpreted in harmony with this conclusion.

On this point, says Judge Story, in the 32d chapter of his Commentaries, after describing at length the "pestilent effect of paper money:" "It was the object of the prohibition to cut up the whole mischief by the roots, because it had been deeply felt by all the States, and had deeply affected the prosperity of all."

(*d*) The act does not consist with the letter or spirit of the Constitution, inasmuch as it assumes to authorize States to impair the obligation of contracts. The reasoning in the foregoing section applies, *mutatis mutandis*, to this point, and need not be repeated. Congress can not authorize the States to do what it has itself no power to do, except in the instance of general bankrupt laws.

(*e*) The act does not consist with either the spirit or letter of the Constitution, which provides that no person shall be deprived of property except by due process of law. In view of the law of Kentucky, *choses in action* are property. They are taxed as property; may be assigned or bequeathed; can be subjected to the payment of debts, descend to legal representatives, pass to the assignee in bankruptcy, etc. To decree the satisfaction of a debt except upon full payment is such a deprivation of property as is prohibited. To compel us to take payment in treasury notes, worth at present only about two thirds of their nominal value, is to deprive us in this instance of nearly half of our property; and, not being done by process of law, is clearly in violation of the Constitution. A declaration by Congress that paper is a legal tender, even if valid, is not a process of law, any more than an enactment that all debts should be reduced one half, or that in the payment of debts sixty cents should count as one dollar. Indeed, the validity of this payment has no relation to the value of the paper. If treasury notes were to become as worthless as the issues of the rebel

government, they could still, if this law is valid, be tendered in full satisfaction of the debt, thus depriving the creditor of the whole of it.

Whether Congress has or has not power to make treasury notes a legal tender, the above provision of the Constitution is adequate to protect the creditor from confiscation. Congress can not give validity to a violation of the supreme law; and, assuming the two premises, first, that treasury notes are tender for debt, and secondly, that no person can be deprived of his property except by legal process, it will follow that to be adeqate the tender of the notes must be sufficient in actual value to satisfy the debt. If the notes are worth half their face, then twice the amount of the debt must be tendered. It is impossible to evade the logic of this conclusion.

(*f*) The act is contrary to the spirit of the Constitution, because it is opposed to honesty and good morals. To establish justice is enumerated as one of its great objects; and this Court will not require me to produce arguments to show that a measure opposed to natural justice and good morals is inconsistent with its spirit. Any law impairing the obligation of contracts gives legal sanction to dishonesty. "The obligation to satisfy all engagements expressed in terms of money, by the payment of specific quantities of gold or silver coin, is the cardinal principle of sound monetary legislation."

Other Constitutional Powers Considered.

(44) The power of Congress to make treasury notes legal tender has been sustained as incidental to the following powers: (1) To declare war; (2) To raise and support armies; (3) To provide and maintain a navy. All these functions, it is argued, require enormous quantities of money, especially in a war of great magnitude, and the Government is justified in resorting to this means of supplying its pecuniary necessities.

"To raise and support armies," "to provide and maintain a navy," doubtless require money. So does it require money to establish post-offices, to hold courts, or to perform any other function of government, in peace or in war. The army and the navy, in relation to money, are on no higher footing than other departments of the public service. The Constitution provides the means of raising revenue. These means are comprised in the two powers (1) of taxation and (2) of borrowing. The argument therefore reverts to these two heads, the latter of which has already been fully considered.

The power of taxation is unlimited in extent. Congress may take from the nation its last dollar. But to declare treasury notes legal tender is not taxation, and if it were taxation, could not be constitutional, because it is not uniform. Its burden falls on one class only of the community—viz: creditors; and on them in unequal proportions. But in its very nature it is not taxation. The money of which the creditor is deprived goes to the debtor, not to the Government. A tax is a rate assessed on the person or property, and paid to the State. If, in the present causes, the decree of the court below should be reversed, and the appellant forced to receive a fraction only of his debt, it would

be a consolation to loyal feeling if the surplus passed into the hands of the Government. So far from this, the party to be benefited by our loss is the plaintiff. This is not taxation. Nor does it mend the matter to term it a forced loan, as it has been called, to the State. In the first place, the proceeds are not received by the State; nor, in the second place, have forced loans, which is only a milder name for spoliation, any warrant in the Constitution.

Monstrum Horrendum, Informe!

(45) But, distinct and apart from any constitutional basis, it has been claimed that in time of war there exists in Congress, or the Executive, or in some parts unknown, a vague, unlimited, and illimitable mass of irresponsible power—sometimes called the WAR POWER! The legitimate powers of war are generally directed against the enemy, but the monstrous war power is pointed at friends, and overthrows the Constitution itself, with all its limitations and safeguards—overthrows all law, under the plea of necessity. To invoke against it a tribunal which has its being by virtue of the very supreme law, which this usurping power assumes to override, is to ask the court to declare that it has a lawful existence.

But the war is over, and the hideous monster may go back to the darkness from which it came.

Power to Regulate Commerce.

(46) Authority for the act has also been claimed under the power to regulate commerce, which is granted in these words: "To regulate commerce with foreign nations, among the several States, and with the Indian tribes."

The argument here is that (A) money is one of the principal instruments of commerce, and that (B) the power to regulate the principle thing involves the power to regulate its instruments.

This is an argument of seeming force, and deserves thorough consideration.

(1) The argument is applicable only to money as acknowledged by the commercial world; or, in other words, to money consisting of the precious metals. As applied to the paper currency of any one country, it involves a fallacy. Such a currency is not an instrument and aid of commerce, but an impediment, hindering negotiations, complicating accounts, variable in value, unsettling commercial calculations, frustrating ventures, and involving bargains in uncertainty. The existing commercial conditions of the United States, and the variations of exchange with foreign countries, are ample demonstrations of the mischievous influence of paper currency on commerce.

(2) Excluding the fallacy just noticed, the argument is correct; and the Constitution provides for the case by conferring power to coin money, to regulate the value of domestic and foreign coins, etc. These provisions clearly define the extent of the power intended to be conferred. The express grant negatives the theory of an additional grant by implication.

(3) The grant of power in question is to "regulate commerce *among* the several States." The meaning and extent of this grant have been subjects of judicial construction. The provision does not extend to or include the *internal* commerce of the States, which is reserved to the States themselves. Congress, from this clause of the Constitution, gets no control over their internal commerce. (Gibbon *vs.* Ogden, 12 Wheaton, 1.) So far, then, as the power to make notes legal tender is incident to the power to regulate commerce, it has no application to the transactions between man and man within the States. That limit includes by far the greater number of contracts, and certainly the one to which the present controversy relates.

All the parties, at the time of the contract, were citizens and residents of the State of Kentucky; the contract was made in that State, and the remedy was sought in Kentucky courts, by Kentucky law. But not only were the transactions purely domestic, they were not commercial. They had no connection with "commerce between the States, or with the Indian tribes, or with foreign nations," or even with commerce of any sort. The provision of the Constitution does not extend to the *internal* commerce of the State of Kentucky, and if it did it would not embrace this case. So that, under any aspect, the power to regulate commerce can not reach this transaction, for the incidental power can not be held to extend beyond the express power to which it is incident.

I believe the foregoing enumeration exhausts the list of all the direct powers, to the exercise of which it is alleged that the making treasury notes legal tender is necessary and proper.

Lowering the Standard of Coins.

(47) An argument is adduced in support of this act, of which I believe the following is an exact exposition: Congress, it is argued, may, if it pleases, debase the coinage, or lower its standard. It may coin lead or iron into money. It has unquestioned power to declare the copper cent a dollar, and make it to be so reckoned in accounts. Such a proceeding as effectually injures contracts, and deprives creditors of their property, as does making depreciated paper a legal tender. If, then, the one act is lawful, why not the other? In reply, I concede that Congress may, if it chooses, make a copper cent a dollar; but that a debt calling for dollars, and contracted previous to the debasement, with the understanding on both sides that the term dollar, as used in the contract, was to designate a certain coin containing a given weight and quality of gold or silver—that such a debt can be satisfied by a tender of copper cents, even if declared by Congress to be dollars, is quite another proposition. For my present purpose, even this proposition may, *pro forma*, be conceded without detriment, and the obvious reply to the argument is that Congress may make a copper cent a dollar, and declare it lawful tender for that amount, because the Constitution in express terms grants the power to regulate the value of coined money; while, on the other hand, it can not make a slip of printed paper lawful tender for a dollar, because the Constitution does

not expressly grant such a power. Because the incidental operation of a delegated power may produce certain consequences, it does not follow that a different power is delegated, because it happens to produce similar consequences.

In a logical sense, this reasoning is a perfect reply to the argument drawn from the debasement of the coin, but in the minds of many there is a further difficulty—vague, perhaps, and ill defined, but still not without influence. That difficulty is embodied in the following question: Why should the Constitution refuse to give Congress power to legalize paper money on account of its injurious effects on individual or other rights, when Congress can in fact produce the same effect by another process; viz: lowering the standard of money?

An easy solution of this difficulty is found in a comparison (1) of the evils respectively of a debased currency and of depreciating paper, and (2) of the temptations that impel governments to resort to each expedient.

We will suppose, then, that a secretary of the treasury needs money; the country is at war; his wants are pressing. The expediency of debasing the coin rises in his mind. Will it be an advantage to reduce by one half the gold or silver in the dollars his mint is coining? So far as he has interest to pay on a funded debt, he will make a clear gain—at the cost of honesty—of one half. But that is a small consideration. It is not the interest he has to pay that troubles him. What he wants is to support the army, to sustain the navy, to purchase subsistence, material of war, etc. It is evident that if he reduces the gold in his dollars by one half he must pay twice as many in number in his transactions. His purchases will require just as much gold as before, and the only difference will be in the nominal price of commodities. Clearly, then, there is no temptation to such a proceeding, even if it were honest. Debasement of the coinage is therefore simply a form of repudiation, and presents no inducement except to profligate governments, which, for the sake of robbing their own creditors,

> "May not scruple to confer on all debtors a license to rob theirs by the shallow and impudent artifice of lowering the standard; that least covert of all modes of knavery, which consists in calling a shilling a pound, that a debt of a hundred pounds may be canceled by the payment of a hundred shillings. It would have been as simple a plan, and would have answered the purpose as well, to have enacted that 'a hundred' should always be interpreted to mean 'five,' which would have effected the same reduction in all pecuniary contracts, and would not have been at all more shameless. Such strokes of policy have not wholly ceased to be recommended, but they have ceased to be practiced; except occasionally through the medium of paper money, in which case the character of the transaction, from the greater obscurity of the subject, is a little less bare-faced."—(*Mills' Political Economy*, Vol. II, p. 21.)

It is easy, therefore, to see why no provision was made against a debasement of the coinage. It was not to be assumed that Congress would descend to the dishonesty of repudiation, but if such degradation should ever threaten the country, no prohibition of this particular form of repudiation would avail to ward off the disgrace.

Evils of Paper Currency.

(48) On the other hand, let the vision of paper money rise before the eyes of the secretary. His perplexity is at an end. A printing press, a ream or two of paper, a few pounds of ink, and the wealth of Crœsus is his. For a time success justifies confidence. But the war goes on; outlays increase in volume and number; thousands expand into millions; millions are multiplied by thousands. The effect is exhilarating; vigor is infused into all the veins and arteries of public life. The experiment seems to work well. But all these charming appearances are symptoms of a vital poison. People have so much paper that they value it less, and are willing to give more of it for the commodities they desire. In other words, it begins to depreciate, and the country is in the broad road to financial destruction. More paper makes higher prices; higher prices call for still more paper. Redundant currency and inflated prices, alternately cause and effect, act and react in ever-augmenting ratio. Public morals are corrupted. Every-where there is speculation, extravagance, fraud—every form of social evil. All these things, and more, do our eyes daily witness.

The evils therefore of a debased coinage, as well as the temptations to resort to it, are as nothing compared with those of a depreciated paper. The Convention wanted no continental money back again. They knew too well both its fascinations and its perils.

Opinions of Daniel Webster.

(49) In closing this argument, I beg leave to quote the clear and unequivocal language of that great constitutional lawyer, Daniel Webster:

"But what is meant by the 'constitutional currency,' about which so much is said? What species or forms of currency does the Constitution allow, and what does it forbid? It is plain enough that this depends on what we understand by currency. Currency, in a large and perhaps just sense, includes not only gold and silver and bank bills, but bills of exchange also. It may include all that adjusts exchanges and settles balances in the operations of trade and business. But if we understand by currency the *legal money* of the country, and that which constitutes a lawful tender for debts, and is the statute measure of value, then undoubtedly nothing is included but gold and silver. Most unquestionably there is no legal tender, and there can be no legal tender in this country, under the authority of this Government or any other, but gold and silver, either the coinage of our own mints or foreign coins, at rates regulated by Congress. This is a constitutional principle, perfectly plain, and of the very highest importance. The States are expressly prohibited from making any thing but gold and silver a tender in payment of debts; and although no such express prohibition is applied to Congress, yet as Congress has no power granted to it in this respect but to coin money and to regulate the value of foreign coins, it clearly has no power to substitute paper or any thing else for coin as a tender in payment of debts and in discharge of contracts. Congress has exercised this power fully in both its branches. It has coined money, and still coins it; it has regulated the value of foreign coins, and still regulates their value. The legal tender, therefore the constitutional standard of value, is established, and can not be overthrown. To overthrow it would shake the whole system.

"The constitutional tender is the thing to be preserved, and it ought to be preserved sacredly, under all circumstances."—*Webster's Works*, Vol. IV, pp. 270–272.

"I am certainly of opinion, then, that gold and silver, at rates fixed by Congress, constitute the legal standard of value in this country, and that neither Congress nor any State has authority to establish any other standard, or to displace this."—*Ibid.*, Vol. IV, p. 280.

H. A. GRISWOLD,
Defendant in Error.